Supreme Court, U.S.
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NO. 97-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT T. HULMES,

Petitioner

v.

HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

William P. Murphy, Esq.
Two Penn Center
Suite 200
Philadelphia, PA 19102
(215) 864-6361
Counsel of Record for
Petitioner Robert T. Hulmes

Lewis M. Levin, Esq.
Joseph R. Viola, Esq.
Seven Penn Center, Suite 300
1635 Market Street
Philadelphia, PA 19103
(215) 496-9000
Counsel for Petitioner
Robert T. Hulmes

164 pp.

QUESTIONS PRESENTED FOR REVIEW

Whether the Third Circuit violated due process and fair administration of federal appellate justice where a Circuit panel used a non-precedential judgment order to affirm a district court's departure from Circuit precedent, thereby arbitrarily singling out Petitioner Robert Hulmes as a class of one for application of a secret, unpublished body of law divergent from published Circuit precedent and *stare decisis*?

Whether the district court federally nullified state law in violation of both *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and binding Third Circuit precedent, by abandoning a policy-based state rule barring evidence of alcohol use absent independent proof of intoxication and by substituting an aberrant federalized rule tantamount to federal "private" common law?

Whether the district court violated Petitioner's right to a jury trial where the jury awarded $4.5 million for his quadriplegia based on failure-to-warn strict product liability, but where the district court nevertheless "molded" a judgment for Honda, through a needlessly hostile view of the jury's answers to special interrogatories?

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CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The United States Court of Appeals for the Third Circuit issued no Opinion in support of its Judgment.

The Opinion of the United States District Court for the District of New Jersey denying Petitioner's post-trial motions is reported at 960 F.Supp. 844 (D.N.J. 1997).

The Opinion of the United States District Court for the District of New Jersey denying Petitioner's motion *in limine* to preclude evidence of alcohol consumption is reported at 936 F.Supp. 195 (D.N.J. 1996), and at Prod. Liab. Rep. (CCH) ¶ 14,857.

The Opinion of the United States District Court for the District of New Jersey denying Petitioner's motion for certification under 28 U.S.C. § 1292(b) is reported at 936 F.Supp. 207 (D.N.J. 1996), and at Prod. Liab. Rep. (CCH) ¶ 14,857.

STATEMENT OF BASIS OF JURISDICTION IN THIS COURT

The Judgment Order of the Three-Judge Panel of the United States Court of Appeals for the Third Circuit (Appendix to Petition for Writ of Certiorari [hereinafter "A-"] at A-1-2) was filed on January 28, 1998.

The Order of the United States Court of Appeals for the Third Circuit denying rehearing and rehearing *en banc* (A-90-91) was filed on March 3, 1998. Pursuant to Rule 13.3, R. Sup. Ct. U.S., the 90-day period runs from that date and expires on June 1, 1998

The Supreme Court of the United States is vested with jurisdiction of this timely petition for writ of certiorari pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

U.S. Const. Amend. 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. 7:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. 10:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the United States District Court for the District of Guam, and the District of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions where they apply.

Procedure 6.2.1, Internal Operating Procedures of the United States Court of Appeals for the Third Circuit:

> A judgment order is filed when the panel unanimously determines to affirm the judgment or order of the district court or the decision of the Tax Court, enforce or deny review of a decision or order of an administrative agency, or dismiss the appeal or petition for review for lack of jurisdiction or otherwise, and determines that a written

opinion will have no precedential or institutional value.

Procedure 9.1, Internal Operating Procedures of the United States Court of Appeals for the Third Circuit:

> **Policy of Avoiding Intra-Circuit Conflict of Precedent.** It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court en banc consideration is required to do so.

Form Letter of the Clerk of the United States Court of Appeals for the Third Circuit accompanying Judgment Orders (excerpt):

> **United States Court of Appeals for the Third Circuit**
>
> To:
>
> NOTICE OF JUDGMENT
>
> A Judgment-Order was entered today in case No. a copy is enclosed herewith. If you wish to seek review by the Court of the Court's order, you may file a petition for rehearing. The procedure for filing a petition for rehearing is outlined below.
>
> PETITION FOR REHEARING
> (FRAP 40 and Third Circuit LAR 35

and IOP Chapter 9)

Rehearing by the Court in banc pursuant to Rule 40, Federal Rules of Appellate Procedure, is not favored. Third Circuit LAR 35.4. In regard to when rehearing by the court in banc might be granted, your attention is specifically directed to Third Circuit IOP Chapter 9:

IOP 9.3 Criteria for Rehearing in Banc:

IOP 9.3.1 This court strictly follows the precept of Rule 35(b), Federal Rules of Appellate Procedure, that rehearing in banc is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.

IOP 9.3.2 This court does not ordinarily grant rehearing in banc when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

IOP 9.3.3 Rehearing in banc is ordinarily not granted when the only issue presented is one of state law.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

STATEMENT OF THE CASE

Robert Hulmes, now age 35, brought this products liability diversity action in the United States District Court for the District of New Jersey, Camden Vicinage, after his Honda ATV overturned in July of 1991, rendering him a permanent quadriplegic.

The type of three-wheeled ATV Hulmes was riding was taken off the market in 1988 pursuant to a consent decree between Honda and the United States Department of Justice. Because Hulmes bought his ATV in 1984, however, he received no benefit from the nationwide ban. He also never received Honda's written 1988 "Safety Alert" warning of an inherent danger of flipping from hitting even a "small rock, bump or hole at low speed . . .." A-120.

In answers to special interrogatories the jury awarded $4.5 million to Hulmes after finding that Honda's failure to deliver the 1988 warning proximately caused the 1991 accident. A-115-118. The district court, per the Honorable Stephen Orlofsky, however, immediately "molded" that verdict into a judgment for Honda (A-84-85), broadly extending a separate finding of comparative fault that arose from controversial "drinking and driving" evidence.[1] Hulmes

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[1] The sole "product liability" cause of action available in New Jersey since the enactment of the New Jersey Product Liability Act, N.J. Stat. Ann. § 2A:58C-1 *et seq.*, in 1987 is one of strict liability

argued unsuccessfully that comparative fault only pertained, if at all, to his design defect claim and not to the failure to warn of an inherent danger which, if Hulmes had known of it in 1988, would have caused him to stop using the ATV before any accident. In taking away the jury's $4.5 million award, the district court in effect interpreted the jury to have meant, oddly, that Hulmes was to blame for knowingly encountering a danger of which he was unwarned.

At the center of the district court's decision to rend Hulmes from the jury's verdict, however, was an underlying ruling which not only led to the comparative fault finding, but controlled the course of the entire trial. The district court had issued a pretrial first-impression ruling that removed the restrictions New Jersey law imposes on admitting evidence of a driver's use of alcohol. The district court's novel ruling parted with New Jersey's mandate that the proponent of such

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-- negligence and breach of warranty claims did not survive the passage of that statute. *Tirrell v. Navistar International, Inc.*, 248 N.J. Super. 390, 398 & n.5, 591 A.2d 643, 647 & n.5 (App. Div.), *cert. denied*, 126 N.J. 390, 599 A.2d 166 (1991). In accordance with pre-existing strict liability jurisprudence, the affirmative defense of "comparative fault" is equivalent to "assumption of the risk" and is available only where "a plaintiff with actual knowledge of the danger presented by the defective product knowingly and voluntarily encounters that risk." *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 158, 406 A.2d 140, 144 (1979). *Cf.* Restatement of the Law (Second) Torts § 402A, Comment *n* (1965).

evidence must show not only alcohol consumption, but also "supplemental evidence" of intoxicated behavior. *Gustavson v. Gaynor*, 206 N.J. Super. 540, 503 A.2d 340 (App. Div. 1985), *cert. denied*, 103 N.J. 476 (1986).[2] In place of the strict state rule and policy, the district court held that even debatable proof of a .10 percent blood alcohol content was enough by itself to usher alcohol into a case.[3]

This ruling was not merely in conflict with state law. It also was in violation of a binding Third Circuit precedent which distilled from *Erie R. Co. v. Tompkins*, 304 U.S. 54 (1938), and its Tenth Amendment core, a command to apply

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[2] None of the eyewitnesses in this case observed any intoxicated acts or behavior, and no one witnessed slurred speech, glassy eyes or any other physical signs or conduct either before or after the accident which caused them to believe Petitioner was intoxicated. This is confirmed by the district court: "There is little 'supplementary evidence' in this case of Hulmes's unfitness to drive" A-20; "[t]here is no eyewitness testimony of Hulmes's physical and mental condition immediately prior to the accident . . ." A-22; "the severity of Hulmes's injuries has created an understandable absence of the typical 'supplementary evidence' of intoxication which might otherwise be expected from eyewitnesses at the scene." *Id.*

[3] In arguing against Hulmes' pretrial motion *in limine* to exclude the alcohol evidence, Honda offered two expert opinions which put Hulmes blood alcohol level at the time of the accident at between .09 and .11 percent. Not even Honda's own offering of proof at that point ruled out the possibility that Hulmes was below the magic .10 mark set by the district court.

Notably there was never any finding by the jury that Hulmes reached this minimum level.

the state rule governing the admission of alcohol evidence in diversity cases. *Rovegno v. Geppart Bros., Inc.*, 677 F.2d 327 (3d Cir. 1982)(Aldisert, J.); *accord Greiner v. Volkswagenwerk Aktiengesellshaft*, 540 F.2d 85 (3d Cir. 1976).

The district court's stunning departure from binding Circuit precedent follows upon Honda's equally stunning strategy of asking that court to make such a departure. A clear acknowledgement that it could not satisfy the New Jersey rule, Honda openly entreated the district court to dispense with *stare decisis* and Circuit authority and extolled the virtues of a substitute **federal** standard through which Honda could have its way. Honda's Brief to The District Court in Opposition to Plaintiff's Motion in Limine (A-92-100). Although the district court obviously had no power to accept Honda's arguments and overrule the Third Circuit directly, it accepted Honda's criticism of the *Rovegno* decision, and searched for "a way out" of the "quagmire" it said the Court of Appeals had created. A-10.

Unfortunately for Hulmes, the "way out" was actually the new .10 percent admissibility rule that abandoned the New Jersey requirement of independent "supplemental" evidence of intoxicated behavior and opened the flood gates to all the distracting prejudice New Jersey law and policy purposely

eschewed from motor vehicle cases.[4] Seizing the opportunity presented by the district court's maverick decision, Honda made "drinking and driving" the main thrust of its defense at trial, portraying Hulmes as a social outcast and stamping him with its stigmatizing slogan -- "booze was in the picture."[5]

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[4] In *Black v. Seabrook Associates, Ltd.*, 298 N.J. Super. 630, 637, 690 A.2d 142, 145 (App. Div. 1997), the Appellate Division of the New Jersey Superior Court reaffirmed the state rule's applicability to motor vehicle cases even after the district court's aberrant decision in this case. In *Black* the court observed that the very purpose of the rule requiring "supplemental evidence" of intoxicated behavior, as laid down in *Gustavson*, was "so that jurors do not overreact when allegations of drinking and driving are involved." *Black*, 298 N.J. Super. at 637, 690 A.2d at 145.

[5] These arguments included the following gratuitous statements by Honda's counsel:

> "Well, we have other evidence of intoxication. First of all, we know that an **unopened** bottle of beer was on Mr. Hulmes in his waistband at the time this accident happened. That's relatively unusual." A-110 (emphasis added).
>
> * * *
>
> "Debbie and Matt Connelly told us that Nick [plaintiff's brother] said they were going to go to the ball field to drink beer. So that's another thing Nick didn't remember, by the way, but that's what -- **so that booze was in the picture**, which we did not create." A-111 (emphasis added).
>
> * * *
>
> "Here we have somebody who for the first time says he ran into something in front of him and the only conceivable reason, ladies and gentlemen, I suggest was alcohol." A-114.

Although this stigma did not keep the jury from finding that Honda's failure to warn had independently caused Hulmes' catastrophic quadriplegia, it did lead to the "comparative fault" finding. A-49. The district court, in turn, used this finding to countermand the jury's award, even though the jury never intended such a result.

On Hulmes' appeal, Honda did not shy away from its open attack on *Rovegno* in the district court, but rather raised as an argument to support affirmance that the Third Circuit precedent should be set aside as wrong. A-101-105. It is indeed a telltale feature of this case that Honda itself believed that keeping the district court's molded judgment could require uprooting existing Circuit law.

Although presented with forty-one pages of published opinions by the district court and a series of complex errors which included the controversial first-impression alcohol decision, a panel of the Third Circuit consisting of Judges Mansmann, Cowen and Alito, on January 28, 1998, affirmed the district court by judgment order without comment. (A-1-2) This disposition officially let stand **both** the novel federalized rule applied by the district court against Hulmes **and** the published Third Circuit precedent the district court violated. The disposition strongly resembled a denial of certiorari, albeit in the absence of certiorari jurisdiction.

In the face of an announced practice that the Circuit

rarely grants *en banc* rehearing in judgment order cases, *see supra* at xiv, Hulmes thereafter filed a Petition for Rehearing With Suggestion for Rehearing In Banc, raising the conflict with standing Third Circuit precedent and seeking further review of the case by the Third Circuit. That petition, however, was denied on March 3, 1998 by an order stating that a majority of active judges did not vote in favor of rehearing, but noting that the Honorable Edward R. Becker, the Chief Judge of the Third Circuit, would have granted the request. (A-90-91) There was no indication that any non-panel jurist besides Judge Becker actively voted on the petition to rehear Hulmes' judgment order case, as opposed to merely allowing the deadline for voting to pass.

It is Petitioner's contention that the district court's break from Circuit law, and the troubling summary affirmance by a Circuit panel, not only produced a blatant federal nullification of state law in this case, but also a disturbing anomaly in the mandatory jurisdiction of our Courts of Appeals and a breach of appellate fairness and due process. The panel's judgment order affirmance in this case privately applied an aberrant legal rule to Hulmes while it preserved a different general rule for the public. This constitutes an inequitable, arbitrary and inequal application to Hulmes personally of a hidden rule of law patently at variance with the precedential Circuit law that continues to apply to everyone

else.

It is in this circumstance, so shocking to the conscience, that Robert Hulmes comes before this Honorable Court and respectfully prays, pursuant to Rule 10(a), R. Sup. Ct. U.S., that it grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit and exercise its inherent supervisory powers over both lower federal courts.

ARGUMENT

THE DISTRICT COURT BREACHED THE TENTH AMENDMENT, DUE PROCESS AND THE FAIR ADMINISTRATION OF JUSTICE BY APPLYING A FEDERALIZED RULE OF DECISION IN PLACE OF THE ESTABLISHED STATE RULE MANDATED BOTH BY *ERIE* AND CIRCUIT PRECEDENT, AND BY THUS CONCOCTING A FORM OF FEDERAL "PRIVATE" COMMON LAW

The Third Circuit in *Rovegno v. Geppart Bros., Inc.*, *supra*, clearly instructed the district court, pursuant to the rule of *Erie*, to apply state law to the admissibility of alcohol evidence. The New Jersey Superior Court Appellate Division in *Gustavson v. Gaynor*, *supra*, in turn, authoritatively defined the state law to require, in addition to proof of alcohol consumption, independent "supplemental evidence" of intoxicated behavior. Indeed, *Gustavson* demonstrated that its supplemental evidence requirement had real teeth by ruling that even evidence of a driver "veering two or three feet out of one's lane" did not meet the threshold. 206 N.J. Super. at 546, 503 A.2d at 343. Indeed, the state rule was specifically intended to protect against the strong public feeling about drinking and driving "so that jurors do not overreact . . . ." *Black v. Seabrook Associates, Ltd.*, 298 N.J. Super. 630, 637, 690 A.2d 142, 145 (App. Div. 1997).

Faced with this state law barrier to introducing its

marginal and disputed evidence of alcohol use,[6] Honda resorted to persuading the district court to rule that the Third Circuit had erred in *Rovegno*, and, in short, that alcohol evidence should be admitted based on the strength of a federal analysis contrary to Third Circuit law.

Astoundingly, Honda's blistering attack on the Third Circuit decision in *Rovegno*, covering 12 pages of its brief to the district court (A-92-100), ultimately convinced the district court that *Rovegno* was a poorly reasoned "quagmire." Openly loathe to follow its clear terms and in search of a "way out" of the "quagmire," the district court transparently rationalized that *Rovegno* itself, though mandating a state law rule of decision, implied an "invitation to district court's in this Circuit to **inform** the application of state law by reference to [Federal Evidence] Rule 403" and thus create a kind of federal/state law hybrid. A-10 (emphasis added). Indeed, the district court devoted six pages of its published opinion to the federal balancing analysis that Honda had vaunted, stating that "[w]hile *Rovegno* instructs me to apply New Jersey law to decide this issue, I may also look to the decisions of federal courts applying Rule 403 . . . ." A-11.

By this circumlocution, the district court federalized a

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[6] In fact, Honda's own experts expressed before trial that Hulmes' level was in a range between .09 and .11 percent, and the jury at no time made any finding that it was ever as high as .10 percent.

state rule of decision that *Rovegno* held was substantive under *Erie*, and then proceeded to free Honda from the state "supplemental evidence" requirement altogether. This is just what Honda had argued for when it asked the district court to overrule the Circuit.

The district court couched the statement of its final holding in the following first-impression terms:

> [T]his court must decide a previously unresolved question of New Jersey law: whether evidence that the plaintiff's blood alcohol level at the time of the accident was at or above .10%, constitutes sufficient "supplementary evidence" of intoxication. Because **I conclude that evidence of a .10% or higher blood alcohol level is sufficient "supplementary evidence" of the plaintiff's intoxication** in this case, and that the danger of unfair prejudice does not substantially outweigh the probative value of this evidence, plaintiff's in limine motion will be denied.

A-4-5 (emphasis added)] The district court's opinion, which is both lengthy and complex, thus begins by boldly announcing this first-time-ever ".10 percent admissibility rule" and ends by unqualifiedly reaffirming it. A-23.[7]

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[7] This statement is so clearly in contradiction to state law and the Third Circuit mandate in *Rovegno* that the district court elsewhere attempted to deny it had ever put the standard in terms of a .10 percent rule. A-51-52. The district court's opinion announcing the rule, however, speaks plainly for itself.

No matter how denominated, the new .10 percent rule -- as "informed" by federal law -- nullified an opposite requirement embodied in state law and clearly articulated in *Gustavson*. The rule which the district court invented might well be termed the "Hulmes rule," as it had never been applied prior to the district court's July 1996 decision and has never been applied since.

Rovegno, of course, patently prohibited any federal dilution of the applicable state rule, and by no rational construction ever hinted that a district court could turn the duty to apply state law under *Erie* into an invitation to make a federalized rule, "quagmire" or no "quagmire."[8] The district court, inspired by Honda's presumptuous advocacy, invented its own rule and evaded both state law and the clear Circuit imperative that should have stopped Honda from ever introducing its drinking and driving evidence.

An illustration of the known and unmistakable conflict between *Rovegno* and the rule originated by the district court,

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[8] The Third Circuit Court of Appeals in *Rovegno* merely observed in an obviously different context that the standard of **appellate review** of a decision using a state "unfitness" rule is an "abuse of discretion" standard. The court merely analogized this appellate review standard to the appellate review standard used in Rule 403 cases. The district court was patently and absolutely mistaken in concluding that it found in *Rovegno* a heretofore hidden instruction that district courts should use Rule 403 instead of the state law rule, when *Rovegno* held that the *Erie* Doctrine mandated the state rule.

are the facts of *Rovegno* itself. Applying a state standard identical to *Gustavson*,[9] the Third Circuit in *Rovegno* upheld the **exclusion** of alcohol evidence where blood content was as high as .158 percent alcohol. The level in *Rovegno* was thus more than 50 percent higher that the .10 percent threshold used as litmus by the district court. Applying the district court's ruling to *Rovegno*'s facts, therefore, would have mandated **admission** of the alcohol evidence and, not surprisingly, a reversal of *Rovegno* -- which is indeed what the district court accomplished.

There is no room for sidestepping the incompatibility between the district court's rule and *Rovegno*'s holding on its facts. Indeed, *Gustavson*, the controlling New Jersey case stating the "supplemental evidence" requirement, directly cited *Rovegno* as an illustration of the New Jersey rule. For the district court to apply its new rule easing the way for prejudicial drinking-and-driving evidence, it had to violate the harmonious mandates of both cases at once.

In this manner, the rule of *Erie*, the rule of *stare decisis*, the inherent necessity that federal trial courts follow appellate decisions binding within their Circuit, and the simple

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[9] The Pennsylvania standard at issue in *Rovegno* is the same as that articulated by New Jersey in *Gustavson*. This is demonstrated most simply through *Gustavson*'s direct citation of both the Pennsylvania case, *Fisher v. Dye*, 386 Pa. 141, 125 A.2d 472 (1956), and *Rovegno* in stating the New Jersey rule.

duty that our courts not create private law for one set of litigants only, were all turned upside down. The result was a rule of decision which, like lightning, struck only Robert Hulmes, making him a class of one as to whom the rule of *Erie*, the rule of *stare decisis*, the rule of appellate authority, and the rule against private and unequal law, were all suspended.

Surely, Justice Brandeis in 1938, by rejecting the very existence of "federal general common law" as a substitute for state law in diversity, *Erie*, 304 U.S. at 78, never envisioned an *Erie* doctrine that would then allow **federal "private" common law** to take its place. Nevertheless, that is a fitting description of what was done by the district court in the present case.

The district court's federal nullification alone fully justifies this Court in granting certiorari or supervisory review. This Court has previously stated in *Leavitt v. Jane*, 518 U.S. 137 (1995):

> To be sure we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so . . . [citations omitted], and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law.

Id. at 144-145. In the present case, however, there is an additional irregularity and urgency for review because a panel

of the United States Court of Appeals for the Third Circuit, in affirming the district court through a non-precedential judgment order, not only let stand the district court's usurpation of state law in violation of *Erie* but also let stand that lower court's rift with binding Circuit precedent just as Honda had advocated.

BY USING A NON-PRECEDENTIAL JUDGMENT ORDER TO AFFIRM THE DISTRICT COURT'S USE OF AN ABERRANT RULE OF DECISION IN CONFLICT WITH BINDING THIRD CIRCUIT PRECEDENT, THE COURT OF APPEALS ARBITRARILY, UNFAIRLY AND IN VIOLATION OF DUE PROCESS APPLIED A HIDDEN BODY OF PRIVATE LAW TO HULMES AS A CLASS OF ONE, WHILE PRESERVING PUBLISHED CIRCUIT LAW FOR EVERYONE ELSE

The Honorable Edward R. Becker, Chief Judge of the Third Circuit, supported the petition for rehearing in which Hulmes presented the sharp conflict between the panel's judgment order and existing Third Circuit precedent. That even one jurist acted, in light of the meager process afforded to judgment order cases, stands as a beacon casting light on the injustice done to Petitioner. Indeed, the decision of other non-panel Circuit jurists not to take affirmative action to seek rehearing of this case can be readily explained, not as a disagreement with Chief Judge Becker, but as a likely consequence of the special policy of the Third Circuit, expressed in a letter accompanying the judgment order, that in

judgment order cases rehearing is rarely allowed. *See* xiv, *supra*. This policy apparently flows from the low priority given to judgment orders in view of their non-precedential character. *Airco Industrial Gases Inc. v. Teamsters*, 850 F.2d 1028, 1031 n.1 (3d Cir. 1988)(judgment orders are non-precedential).[10] A denial of rehearing by abstention in a judgment order case is, therefore, fully to be expected in view of both the rehearing process and the panel's initial decision to mark the case for judgment order treatment. It is therefore more remarkable and revealing that even one jurist voted in favor of rehearing despite the judgment order classification and the absence of any circulating panel opinion.

The complications flowing from restricting

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[10] In the absence of a circulating Opinion, the members of the Circuit Court may fairly have assumed compliance with internal rules limiting judgment orders to cases having no precedential significance and therefore given less credence to any petition for rehearing from a judgment order.

Procedure 6.2.1, Third Circuit Internal Operating Procedures, *see* xii-xiii, *supra*, provides that a judgment order should be used only when "a written opinion will have no precedential or institutional value," and, logically, when a case also falls short of the minimum standards for a Memorandum or Not-for-Publication Opinion under the terms set forth in Procedure 5. By these standards it was atypical for the Third Circuit to apply the judgment order device to a case where Honda openly attacked Third Circuit precedent both in the District Court and on appeal in the Third Circuit. The high use of judgment orders in the Third Circuit, however, cries out for attention to the difficulty faced by Petitioner in this case. *See* text *infra* at 16 and n.11.

reconsideration of judgment order cases are greatly heightened in the Third Circuit, which makes far and away the greatest use of judgment orders among all the Circuits. In the one year period ending September 30, 1997, the Third Circuit used that disposition 990 times out of a total of 1,873 cases -- nearly fifty three percent of the time and significantly more than any other Circuit. *Judicial Business of the United States Courts 1997*, Table S-3. This Administrative Office data gives rise to the increased institutional risk in the Third Circuit that a judgment order device may be used to **avoid** full review in thorny cases rather than **expedite** disposition of the simplest cases where no novel issue or open challenge to Circuit precedent is tendered.[11] That such inappropriate use of a judgment order was made in this case is suggested by Third Circuit Internal Operating Procedure 6.2.1, which limits that classification to cases where "a written opinion will have no precedential or institutional value." *See* xii, *supra.*

The published first-impression ruling of the district court criticizing Third Circuit precedent as a "quagmire," combined with Honda's appellate request to overrule that Circuit precedent **in order to affirm**, would appear without

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[11] More than half the Circuits made no use at all of judgment orders; the next closest Circuit used it in 21.3 percent of its cases; and all Circuits together used it in less than 9% of cases. *Judicial Business of the United States 1997*, Table S-3.

more to disqualify the use of a judgment order disposition. Indeed, the use of the judgment order in this case of complex issues and catastrophic injuries implies a discretionary denial of certiorari by a Court of Appeals that lacks the jurisdiction to do so. *E.g., National Labor Relations Board v. Amalgamated Clothing Workers of America, AFL-CIO, Local 990*, 430 F.2d 966, 972 (5th Cir. 1970)(Brown, C.J.)(Review by a court of appeals is a matter of right not of "*certiorari*-type discretion.").

The mandate of equal protection of law that inheres in the Fifth Amendment to the United States Constitution, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975), requires that an individual before a tribunal not be subjected arbitrarily to one rule of law regardless of *stare decisis*, while others before that same tribunal who are similarly situated may enjoy a different rule within the protective *stare decisis* framework. Where a single Circuit Court, having been given by Congress no discretionary jurisdiction comparable to that possessed by the United States Supreme Court to deny application for a writ of certiorari, nevertheless countenances one rule publicly and a different one privately in resolving the cases or controversies it is mandated to decide, that Circuit Court tears at the fabric of due process and the fair administration of appellate justice. *Cf. Salve Regina College v. Russell*, 499 U.S. 225, 234 (1991)(when court of appeals

defers to district court's decision on state law and fails to exercise full independent review, it impermissibly creates "a dual system of enforcement" at odds with *Erie*).

Adherence to equal protection principles will not permit such inconsistent adjudications to exist contemporaneously, any more than adherence to the laws of physics will allow one breath to be both hot and cold. While the Third Circuit Court of Appeal's procedure could well be justified as a denial of certiorari and therefore a postponement to address the issues, the function of letting lower court decisions stand without further review is reserved by law for this Honorable Court alone. This leaves only one explanation for the Third Circuit's decision below -- that there are two bodies of Circuit law concerning the duty under *Erie* to apply the state rule governing admission of alcohol evidence, one based on published precedent and the other one secret, unpublished, non-precedential and random. *Cf. County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985)(Stevens, J., dissenting) ("decision not to publish the opinion [of court of appeals] or permit it to be cited -- like the decision to promulgate a rule spawning a body of secret law -- was plainly wrong.").

Even in diversity cases, where the existence of an amount in controversy requirement indicates some lessened federal interest than in cases arising directly under federal law,

a quadriplegic plaintiff should never fall through cracks of the fair administration of federal appellate justice and be singled out for the denial of state law rights enjoyed by others similarly situated. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972). The light cast by the vote of Chief Judge Becker of the Third Circuit favoring rehearing also illuminates the rift created by the panel's judgment order disposition and conflicting Circuit precedent.

This matter is respectfully raised for the Court's certiorari or supervisory intervention in the hope that the cracks may be sealed and that appellate justice may be restored to your Petitioner Robert Hulmes.

THE DISTRICT COURT VIOLATED HULMES' RIGHT TO A JURY TRIAL BY INVALIDATING THE JURY'S DECLARED DECISION TO AWARD HIM A $4.5 MILLION VERDICT AND "MOLDING" A DEFENSE JUDGMENT FOR HONDA THROUGH A NEEDLESSLY HOSTILE VIEW OF THE JURY'S ANSWERS TO INTERROGATORIES

It is axiomatic that "where there is a view to the case that makes a jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 364 (1962). *Accord, McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 763 (3d Cir. 1990)(noting the "very limited discretion a court has in molding a jury's answers to special

interrogatories"). A district court is also supposed to consider all the "surrounding circumstances," including "the pleadings, [and] the issue or question submitted" in support of the jury's resolution. *Halprin v. Mora*, 231 F.2d 197, 200 (3d Cir. 1956).

Despite the clear standard which the district court was bound to follow in molding a verdict, it mistakenly drew all inferences in favor of Honda, whom the jury declared to be the verdict loser. It interpreted the jury's finding of comparative fault by Hulmes in an overly expansive way that disregarded New Jersey law and unnecessarily contradicted the jury's other findings and the award of $4.5 million itself. Moreover, when confronted post-trial with the contradictions that its molded judgment for Honda had produced, the court either discredited the inconsistencies or dismissed them as unreconciled loose ends.

The district court clearly stated in its instructions to the jury that

> [i]f the . . . failure to warn did not **add to the risk** of the occurrence of the accident and hence was not a contributing factor in the happening of the accident, then plaintiff has failed to establish that a defect was a proximate cause of the accident. [A-107 (emphasis added)]

The district court made it clear to the jury that Robert Hulmes would lose if he would not have obeyed the warning he

claimed was missing:

> If you find by a preponderance of the evidence that the plaintiff would not have read, understood or conformed his conduct to an adequate warning if one had been given, then Honda cannot be held liable. [*Id.*]

In the setting of these and other instructions which infused its deliberations, the jury found that Honda failed to warn Hulmes and that the failure to warn proximately caused his quadriplegic injuries. A-115-116.

Also contributing to a true definition of the jury's findings are the circumstances in which the failure-to-warn theory was presented. In this regard, the only failure-to-warn theory that Robert Hulmes offered at trial was that Honda should have transmitted to him its 1988 "Safety Alert" about the problem of uncontrollable flipping. A-120. Hulmes' evidence showed that in the time between the composition of this 1988 "Safety Alert" and the accident of July 28, 1991, Honda did not provide him with that potent warning of the inherent danger of using the ATV. Robert Hulmes also specifically testified that if he had received this warning at any time prior to the accident he would have done one thing -- "got[ten] rid of" the three-wheeled Honda ATV long before the accident happened. A-106.

The law of New Jersey specifically permits the jury to accept the testimony of a plaintiff that he would have

refrained from using the product altogether upon receiving a warning of an inherent risk. *Facendo v. S.M.S. Concast, Inc.*, 286 N.J. Super. 575, 670 A.2d 22 (App. Div. 1996). The danger of uncontrollable flipping warned of in the 1988 Honda "Safety Alert" unquestionably posed an inherent risk of using the product. As explained in *Facendo*, a plaintiff has both the right and opportunity to end his exposure to the product after receiving such information.

The sole failure-to-warn theory presented by Robert Hulmes to the jury, both in evidence and argument, was thus that he would have refrained from using the Honda ATV if he was told in or around 1988 about the inherent danger of sudden flipping. The jury, of course, exercised its exclusive power as factfinder to assess the credibility of Hulmes' testimony and decided, in perfect harmony with the court's instructions on the law, that he would have conformed to the warning of added risks by refraining from any further use. Hence the jury awarded him $4.5 million for his catastrophic injuries.

The district court, however, flatly refused to recognize any possibility that the 1991 accident would have been avoided by the 1988 warning about uncontrollable flipping and nullified the jury's verdict. The district court's award of judgment for Honda was marked by hostility toward Robert Hulmes' failure-to-warn claim and toward the jury's findings,

not by any search for consistency or attempt at reconciliation. This is evidenced by the district court's suggestion that the unknown risk warned about in the 1988 "Safety Alert" did not matter:

> That there may have been some other danger highlighted in P-524 [the "Safety Alert"--A-121] which was not then known to plaintiff does not mean that Hulmes did not voluntarily encounter a known danger. It merely proves that he did not voluntarily encounter the danger described in P-524 [the "Safety Alert"].[A-49].

This belittling of the jury's finding of an unknown danger is complemented by other remarkably hostile observations by the district court: that the connection between the missing warning and Robert Hulmes' injury was itself "most tenuous" (A-46), and that there was an "insufficient nexus" (A-47) between the failure to give the 1988 warning about uncontrollable flipping and an accident in which the ATV flipped.

The district court thus disparaged, discounted and minimized jury findings for Hulmes whenever those findings conflicted with the judgment the court imposed. It "molded" a judgment which stands for the view either that Hulmes may be blamed for encountering a risk of which he was never warned, or that a finding that Hulmes would have discontinued use of the product need not be honored. Either way, the district court most assuredly did not seek to reconcile findings to support the

jury's award for Hulmes nor did it make any inferences at all in Hulmes' favor. By such a standard, no jury verdict is constitutionally secure.

IN RESPECT TO THE ISSUE OF THE COURT OF APPEALS' DENIAL OF APPELLATE FAIRNESS BY ALLOWING DIVERGENT BODIES OF PRIVATE AND PUBLIC LAW THROUGH USE OF A JUDGMENT ORDER TECHNIQUE, THIS CASE QUALIFIES FOR EXERCISE OF THIS HONORABLE COURT'S "GVR" POWER

This Honorable Court in *Lawrence v. Chater*, 516 U.S. 163 (1996), approved the practice of granting certiorari, vacating and remanding (a "GVR" order) in appropriate cases as a means to "conserve[ ] the scarce resources of this Court that might otherwise be expended on plenary consideration . . . [and to] assist[ ] the court below by flagging a particular issue that it does not appear to have fully considered . . . ." *Id.* at 167.

The rationale supporting a GVR is well-suited to the present case if this Court rejects Petitioner's request for plenary review but agrees that the problems associated with the Court of Appeals' use of a judgment order could well be flagged for the Circuit's benefit. Inasmuch as the present Petition is based in important part on the peculiar ramifications of a judgment order which, naturally, was issued **after** briefing and oral argument on the merits, the only opportunity the Third Circuit had in which to consider the fairness issue raised here was via a

petition for rehearing. Paradoxically, that petition was given low priority precisely **because** the judgment order classification was used and no opinion had been circulated. The emergence of even a single vote, that of the Chief Judge of the Third Circuit, to grant rehearing in these circumstances was itself against all odds, and indicates that the petition had true merit. The absence of other affirmative votes, by contrast, is not an indication of a purposeful rejection of the petition for rehearing.

Thus, absent a grant of plenary review by this Honorable Court, a remand to the Third Circuit Court of Appeals with instructions to refrain from a judgment order disposition would at least require Petitioner's claim of unequal application of law to be addressed on the merits by that Court.

CONCLUSION

The judgment order is the principal method of decision employed by the United States Court of Appeals for the Third Circuit in the exercise of its mandatory appellate jurisdiction. Its use in the present case, however, produced a tragic lapse in appellate justice. It let stand without comment or precedential effect a district court's controversial first-impression decision which, at the bold behest of Honda Motor Company, Ltd., undercut binding Circuit precedent and nullified state law in diversity. At the same time the Court of Appeals let stand, for application to everyone **but Robert Hulmes**, the self-same Circuit precedent that in Hulmes' case was suspended.

The institution of a private and unpublished "Hulmes rule," for use in this case only, was an arbitrary breach of appellate fairness and a shocking violation of due process. It constituted, in effect, a forbidden exercise of certiorari jurisdiction by the Court of Appeals and a denial of the meaningful appellate process mandated by Congress. Only a grant of a writ of certiorari by this Honorable Court can correct the drastic consequences to Petitioner, a permanent quadriplegic, in being judicially exiled to a legal island where published Circuit law does not prevail, where a state rule of decision may be ignored under *Erie*, where a form of federal "private" common law may be substituted as a rule of decision in diversity, and where each of these aberrations may be

accomplished without an effect on general precedential law.

The breakdown in the judicial process afforded to Petitioner below is evidenced not only by the paradox through which the district court was asked to, and in substance did, alter Circuit precedent and avoid state law in diversity, but also by the district court's invalidation of a jury's declared award of $4.5 million to Robert Hulmes on a failure-to-warn strict product liability theory. This judicial nullification of the jury's award derived from a hostile judicial view of answers to special interrogatories that were, in light of New Jersey product liability law, entirely reconcilable with the award. If it was the equivalent of legal lightning that struck Hulmes in being singled out for the application of the one-time federalized rule of decision discussed above, then lightning struck him a second time when the district court molded a jury's express damage award for Hulmes into a defense judgment for Honda.

In this petition of last resort, Petitioner Robert Hulmes respectfully implores the Court to grant certiorari and exercise its supervisory power to correct a grave constitutional injustice to Petitioner and to remedy for all future cases the unsettling appellate practice which that injustice reveals.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit and

afford plenary review. Alternatively, Petitioner respectfully requests that this Honorable Court exercise its GVR power to allow the Third Circuit to decide Petitioner's appeal without use of the judgment order device which has had the effect of arbitrarily singling out Petitioner for application of a body of law divergent from published Circuit precedent.

Respectfully submitted,

WILLIAM P. MURPHY, ESQUIRE
Counsel of Record for Petitioner
Robert T. Hulmes

LEWIS M. LEVIN, ESQUIRE
Counsel for Petitioner
Robert T. Hulmes

JOSEPH R. VIOLA, ESQUIRE
Counsel for Petitioner
Robert T. Hulmes

All counsel above-named are members in good standing of the Bar of the Supreme Court of the United States.

DATED: May , 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5135

ROBERT T. HULMES

v.

HONDA MOTOR COMPANY, LTD.;
HONDA RESEARCH AND DEVELOPMENT GROUP, LTD.;
HONDA R & D NORTH AMERICA, INC.;
AMERICAN HONDA MOTOR COMPANY, INC.
Defendants/Third-Party Plaintiffs

v.

NICHOLAS J. HULMES
Third Party Defendant

(Camden New Jersey District Civil No. 93-02771)

SHERRY HULMES

v.

HONDA MOTOR COMPANY, LTD.;
HONDA RESEARCH AND DEVELOPMENT GROUP, LTD.;
HONDA R & D NORTH AMERICA, INC.; AMERICAN
HONDA MOTOR COMPANY, INC.;
CORNICK, INC., t/a DEPTFORD HONDA

(Camden New Jersey District Civil No. 93-03329)

ROBERT T. HULMES,
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 93-cv-02771)
Honorable Stephen M. Orlofsky

Argued
January 26, 1998
Before: MANSMANN, COWEN and ALITO, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

BY THE COURT:

/S/ CAROL LOS MANSMANN
Circuit Judge

Attest:

/S/ P. DOUGLAS SISK
P. Douglas Sisk, Clerk
JAN 28 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	HON. STEPHEN M. ORLOFSKY CIVIL ACTION NO. 93-2771. CONSOLIDATED ACTIONS OPINION
SHERRY HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	

[Opinion of the District Court dated July 22, 1996]
* * * *

ORLOFSKY, District Judge:

Plaintiff, Robert T. Hulmes ("Hulmes," or the "plaintiff"), filed this product liability action against defendants, Honda Motor Company, Ltd., Honda Research and [3] Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc. (collectively referred to as "Honda"). Plaintiff, Sherry Hulmes, Hulmes's former wife, has filed a per quod action which has been consolidated with Hulmes's action. Jurisdiction is based on diversity of citizenship and an amount in controversy in excess of $50,000, exclusive of interests and costs. See 28 U.S.C. § 1332.

This opinion addresses one of forty-four (44) in limine motions filed by the parties. In this motion, plaintiff seeks an in limine ruling barring evidence that he consumed alcohol prior to the accident which resulted in his catastrophic injury.

The issue presented for this court's resolution is whether evidence of the plaintiff's consumption of alcohol prior to the accident in which he was injured may be introduced at trial, in light of New Jersey's evidentiary rule barring such evidence unless it is accompanied by independent "supplementary evidence" that the plaintiff was unfit to drive at the time of the accident. Specifically, this court must decide a previously unresolved question of New Jersey law: whether evidence that the plaintiff's blood [4] alcohol level at the time of the accident was at or above .10%, constitutes sufficient "supplementary evidence" of intoxication. Because I conclude that evidence of a .10% or higher blood alcohol level is sufficient "supplementary evidence" of the plaintiff's intoxication in this case, and that the danger of unfair prejudice does not substantially outweigh the probative value

of this evidence, plaintiff's in limine motion will be denied.

I. Facts and Procedural History

On July 28, 1991, Hulmes was severely injured as the result of a collision which occurred while he was riding a three-wheeled All-Terrain Vehicle ("ATV") designed and manufactured by Honda. Hulmes and his brother, Nicholas Hulmes, were riding their ATVs on the paved roadway of West Hunterdon Avenue in the City of Mantua, Gloucester County, New Jersey. There is some dispute as to how fast the ATVs were going at the time of the accident. Plaintiff's eyewitness testimony estimates their speed at about 17-20 m.p.h. See Dep. of Corey Thomas at 95. Defendants' accident reconstruction expert will testify that Hulmes's ATV was travelling at a speed of between 35-40 m.p.h. Report of David Mercaldi, Ph.D. at 8. It is undisputed that [5] Hulmes's ATV came into contact with the ATV operated by his brother, although the force of this "collision" is an issue that is vigorously contested by the parties. Following the "collision," Hulmes's ATV rolled over, Hulmes was thrown from the vehicle, and both the vehicle and Hulmes came to rest some yards away. As a result of this accident, Hulmes suffered a spinal fracture at C3-C4 and spinal cord lesion, resulting in permanent quadriplegia.

Deborah Connelly, who lived nearby, heard the accident and went to the scene. Dep. of D. Connelly at 13, 19. Ms. Connelly testified that Nicholas Hulmes removed an unopened bottle of beer from the plaintiff's waistband shortly after the accident. Id. at 25-27. Ms. Connelly also testified that she did not smell alcohol on the plaintiff's breath, but, in view of the fact that the plaintiff was lying on the ground, she couldn't tell if the plaintiff was intoxicated. Id. at 39.

The Advanced Life Support Unit from Underwood Hospital arrived at the scene soon after the accident. Because Hulmes did not have a patent airway, the Advanced Life

Support Unit paramedics inserted an endotracheal tube and ventilated Hulmes, using a bag and mask resuscitator. Dep. [6] of C. McNulty at 98-99. Shortly thereafter, the trauma team from Cooper Hospital arrived by helicopter. The flight nurse, Catherine N. McNulty, R.N., testified that she continued ventilating Hulmes with the bag and mask resuscitator during transport to the trauma center, periodically suctioning from him an amber fluid that "smelled like alcohol." Id. at 105-108.

Plaintiff's brother, Nicholas Hulmes, testified at his deposition that neither he, nor his brother, had "consumed any alcoholic beverages" on the day of the accident. Dep. of N. Hulmes at 125. A member of the Sewell Fire Company Ambulance Squad and a witness at the scene, testified that Nicholas Hulmes was "belligerent" at the accident scene. Dep. of J. Neely at 24. Neely, however, also testified that he did not smell alcohol on Nicholas Hulmes's breath. Id. At oral argument, counsel represented that Hulmes himself had testified at his deposition that he could not remember whether he had consumed any alcoholic beverages prior to the accident.

II. Discussion

The Third Circuit has noted that "in limine ruling on evidence issues is a procedure which should, in a trial [7] court's discretion, be used in appropriate cases." In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 260 (3d Cir.1983) (citing 21 C. Wright & K. Graham, Federal Practice and Procedure § 5037, at 193-99), rev'd on other grounds sub nom. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

No doubt in an abundance of caution, plaintiff's counsel has identified over 1400 trial exhibits in plaintiff's portion of the Joint Final Pretrial Order. In the hope of

narrowing the issues and expediting the trial of this case, this court granted the parties leave to file appropriate motions in limine. The parties subsequently filed a total of forty-four (44) in limine motions. On July 2, 1996, following a full day of oral argument on July 1st, this court entered an order deciding, or deferring until trial, forty-one (41) of the in limine motions. This opinion and the accompanying order decide one of the three motions taken under advisement following oral argument.

A. Plaintiffs' motion to exclude all references to alcohol consumption by Robert T. Hulmes.

Honda seeks to introduce evidence that the plaintiff was intoxicated at the time of the accident. Specifically, **[8]** Honda proffers evidence of the presence of alcohol (ethanol) in Hulmes's blood, in an amount of 106.9 mg/dl, as determined by a blood serum test administered on a sample of Hulmes's blood drawn at Cooper Hospital approximately one hour after the accident. Cooper Hospital Pathology Report at 8. Defendants' toxicology expert will testify that this reading extrapolates to a Blood Alcohol Content ("BAC") in whole blood of .11% at the time of the accident. Report of G. John DiGregorio, M.D. at 2.[1] A second Honda expert witness opines that the "most likely value for [Hulmes's] blood alcohol concentration" was "slightly above .10%." Plaintiff strenuously contests the accuracy of these extrapolations.

Moreover, plaintiff contends that the results of blood alcohol tests, unless supported by independent corroborating

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[1] Dr. DiGregorio, in making the extrapolations in his report, assumes that Hulmes was in the "elimination phase" rather than in the "absorption phase" during the one hour interval between the accident and the blood test. Report of G. John DiGregorio, M.D. at 1-2.

evidence of intoxication, not present in this case, are inadmissible under New Jersey law because the potential prejudicial effect of such evidence substantially outweighs its probative value.

[9] *B. The Prejudicial Effect of Evidence of Alcohol Consumption*

The Third Circuit has held that, when confronted with the task of balancing the prejudicial effect of evidence of alcohol consumption with its probative value, a district court must look to state law to determine whether the prejudice to the party opposing the introduction of such evidence would be substantial. Rovegno v. Geppert Bros., Inc., 677 F.2d 327, 329 (3rd Cir.1982) (relying upon Greiner v. Volkswagenwerk Aktiengeselleschaft, 540 F.2d 85, 89 (3d Cir.1976)).

Rovegno has proved to be a controversial decision. Judge Van Dusen, in a lengthy dissenting opinion, chastised the panel majority for its holding, declaring that Greiner may not so much have held, as assumed that the Erie Doctrine was applicable to a decision to admit evidence of drinking. See id. at 338 & n. 21 (Van Dusen, J., dissenting) (discussing Erie R.R. v. Tompkins, 304 U.S. 64 (1938)). There is an on-going and passionate debate about whether state law or federal law governs the admissibility of such evidence. Some authorities have suggested that the application of state law can be justified by simply rephrasing the question as one of the "materiality" under [10] state law of evidence of alcohol consumption, rather than its probative value or prejudicial effect. See 5 Jack B. Weinstein et al., Weinstein's Evidence ¶ 1101[02] (Matthew Bender 1995); see generally 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5201, at 234 & n. 29 (1978 & Supp.1996) (noting that the Third Circuit, in Rovegno, applied state law, "[o]ver vigorous dissent and without discussion of the effect

of Rules 401 and 402").

Other courts have concluded that the Rovegno majority discounted the rule of Hanna v. Plumer, 380 U.S. 460 (1965), which held that federal law governed all "procedural" matters in federal courts, even in actions in which state law supplies the rule of decision. See McInnis v. A.M.F., Inc., 765 F.2d 240, 245 n. 6 (1st Cir.1985) (specifically criticizing Rovegno). The true difficulty, however, lies in "ascertain[ing] whether a particular rule [of state law] is 'only evidentiary or is meant to prescribe rights and obligations of the parties not related to fact-finding.' " Weinstein, supra (citing Wellborn, The Federal Rules of Evidence and the Application of State Law in the Federal Courts, 55 Tex.L.Rev. 371, 396 (1977)). Cf. Gasperini v. [11] Center for Humanities, 64 U.S.L.W. 4607, 4610 (U.S. June 24, 1996) ("Classification of a law as 'substantive' or 'procedural' for Erie purposes is sometimes a challenging endeavor.").

Several Circuit Courts of Appeals have disagreed with Rovegno, holding that a determination of the possible prejudicial effect of the introduction of evidence of alcohol consumption is within the trial court's discretion under Rule 403 of the Federal Rules of Evidence, and is not controlled by state law. See Romine v. Parman, 831 F.2d 944 (10th Cir.1987) (relevancy and prejudice determinations are made under Fed.R.Evid. 403); McInnis, 765 F.2d at 244-45 (1st Cir.1985) (a panel, which included then-Judge Breyer, ruled that the Federal Rules of Evidence, and not state law, apply to a determination whether to admit evidence of intoxication); Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1153 (5th Cir.1981); Levitt v. H.J. Jeffries, Inc., 517 F.2d 523, 525 (7th Cir.1975). Indeed, the Rovegno majority does not explain how the application of Fed. R. Evid. 403, rather than state law, could "rationally affect private ordering or encourage forum shopping." McInnis, 765 F.2d at 246 (citing Erie). The weight of authority seems to support [12] the conclusion

reached in McInnis, that, in deciding whether to admit evidence of alcohol consumption, the application of Fed. R. Evid. 403 by a federal court cannot violate the "twin aims" of Erie. Hanna v. Plumer, 380 U.S. at 468.

Honda devotes a significant portion of its brief in opposition to plaintiff's motion to a discussion of the controversy engendered by Rovegno to demonstrate that Honda would prevail on this evidentiary issue if I were to apply Fed. R. Evid. 403, rather than New Jersey law. Rovegno, however, bars me from taking that path.

In Straley v. United States, 887 F.Supp. 728, 732-39 (D.N.J.1995), a case brought under the Federal Tort Claims Act, in which, as in diversity cases, the rule of decision is supplied by state law, Judge Debevoise conducted a comprehensive analysis of the current state of the law in light of the debate over the Rovegno decision. Judge Debevoise finally concluded, as I do, that the Third Circuit meant what it said in Rovegno, and that, "on the question of alcohol consumption, [Rovegno] requires the application of state law rules of admissibility." Id. at 737.

Happily, Rovegno itself points to one way out of the quagmire it has created. In its analysis of Fisher v. Dye, [13] 386 Pa. 141, 125 A.2d 472, 476 (1956), the leading Pennsylvania decision interpreting the admissibility of evidence of alcohol consumption, the Rovegno majority concluded "that the Pennsylvania decision implicitly requires the same discretionary weighing required by Rule 403. Thus, in interpreting Fisher v. Dye and its progeny, we may draw on our own decisions dealing with review of Rule 403 exercises." Rovegno, 677 F.2d at 329. Rovegno's invitation to district courts in this Circuit to inform the application of state law by reference to Rule 403, is reinforced by the happy coincidence that on July 1, 1993, New Jersey amended its rules of evidence, closely modeling its new rules on the Federal Rules

of Evidence. Indeed, New Jersey's Rule of Evidence 403 closely parallels Fed.R.Evid. 403.[2] Accordingly, while Rovegno instructs me to apply New Jersey **[14]** law to decide this issue, I may also look to the decisions of federal courts applying Rule 403 in balancing the probative value of evidence of alcohol consumption against the potential prejudicial effect of such evidence.

C. The "Balancing Test"

Under either New Jersey Evidence Rule 403 or its federal equivalent, a trial court may exclude otherwise relevant evidence "if its probative value is substantially outweighed" by the danger of unfair prejudice. Thus, as a threshold matter, I must decide whether the evidence of Hulmes's alcohol consumption is probative. Under either the New Jersey Evidence Rules or the Federal Rules of Evidence, relevant evidence is that which tends to prove or disprove any fact that is of consequence to the outcome of the action. Fed. R. Evid. 401; N.J. R. Evid. 401. Plaintiff, in this in limine

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[2] New Jersey's rule provides:

> Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of the issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.

N.J. R. Evid. 403. The official comment to this rule explains that "Rule 403 contains the principles established by both N.J. Evid. R. 4 and Fed. R. Evid. 403. Although the formulation is closer to the federal rule than the 1967 New Jersey rule, the intention was to retain the principles of N.J. Evid. R. 4 as construed by New Jersey courts." N.J. R. Evid. 403 cmt. (citations omitted).

motion, does not challenge the relevance of the evidence of Hulmes's alcohol consumption, but only the prejudicial effect of such evidence.

Nevertheless, the probity of the evidence of alcohol consumption bears analysis because, in a balancing test, evidence which is probative on two or more issues might arguably require a greater degree of prejudice before it **[15]** could be said that the danger of unfair prejudice "substantially" outweighs the probative value of the evidence.

The plaintiff in a products liability case must demonstrate that the product was not misused, or that the misuse was foreseeable to the manufacturer. Jurado v. Western Gear Works, 131 N.J. 375 (1993). In a case based upon a failure to warn, evidence of misuse might "include a showing that the plaintiff either disregarded an adequate warning or would have done so had the warning been given." London v. Lederle Labs, 290 N.J. Super. 318, 327 (App.Div.1996) (citing Coffman v. Keene Corp., 133 N.J. 581, 604 (1993), and Calderon v. Machinenfabriek Bollegraaf Appingedam B.V., 285 N.J. Super. 623 (App.Div.1995)). Thus, evidence of Hulmes's consumption of alcohol is relevant to rebut the presumption that Hulmes's would have followed additional warnings had they been given. See Coffman v. Keene Corp., 133 N.J. 581 (1993) (the plaintiff in a failure to warn case benefits from a rebuttable presumption that he or she would have followed an adequate warning had one been given).

[16] Furthermore, evidence of misuse of a product "is relevant to the issue of proximate cause because it may establish that the plaintiff's conduct was the cause-in-fact of the injury." Id. (citing Johansen v. Makita USA, Inc., 128 N.J. 86, 92 (1992)). Evidence of Hulmes's alcohol consumption is also relevant, therefore, to the issue of proximate cause. In some cases, the plaintiff's conduct may

be so remotely related to the accident, if it is related at all, that whether the plaintiff had consumed alcohol prior to the accident is of little probative value on the issue of causation. See, e.g., Lewis v. Horace Mann Ins. Co., 442 So.2d 526 (La. Ct. App.1983) (overturning finding that alcohol was a substantial contributing cause when the plaintiff testified that the defendant was not using his turn signal and was within 20 or 30 feet when he suddenly turned into the plaintiff). By contrast, in this case, both parties agree that the accident was precipitated by the contact between plaintiff's Honda ATC250R and the ATV driven by his brother, while the plaintiff was attempting to "pass" his brother's ATV.

The leading New Jersey case on the admissibility of evidence of alcohol consumption by a party prior to an [17] accident in which that party is involved is Gustavson v. Gaynor, 206 N.J. Super. 540 (App.Div.1985). In Gustavson, the defendant admitted to having had "two or three bottles of beer" some five to six hours before the accident. Id. at 543. There was no blood test available and no eyewitness testimony corroborating the defendant's intoxication. The Gustavson court held that:

> The mere fact that a driver had consumed some alcoholic beverages is by itself insufficient to warrant an inference that the driver was intoxicated and that the intoxication was of such a degree as to render him unfit to drive at the time of the accident. The admission of such evidence without supporting evidence is unduly prejudicial in view of its capacity to inflame the jury.

Id. at 545.

Other "supplementary evidence from which the [jury]

... may reasonably conclude that the drinking affected the safe operation of the vehicle" includes, without limitation, "excessive drinking, driving at an excessive speed, recklessness or erratic driving, drunken behavior at the accident scene, or similar acts suggestive of an unfitness to drive." Gustavson, 206 N.J. Super at 544-45 (citing Rovegno, 677 F.2d at 330-31); cf. Straley, 887 F.Supp. at 737 (citations omitted).

[18] The rule announced in Gustavson has also been applied in Guzzi v. Clarke, 252 N.J. Super. 361 (L. Div.1991), and in opinions of the United States District Court for the District of New Jersey in Clement v. Consolidated Rail Corp., 130 F.R.D. 530 (Wolfson, M.J.), aff'd, NO. CIV. 88-3793, 1990 WL 49978 (D.N.J. April 17, 1990) (Fisher, J.). The Gustavson rule, like the Pennsylvania rule of Fisher v. Dye, and similar rules in other states, is designed to exclude potentially prejudicial evidence unless that evidence reliably supports a conclusion that the party against whom it will be introduced was "unfit to drive" at the time of the accident. See Clement, 130 F.R.D. at 537.

In Guzzi, the Law Division admitted expert testimony analyzing the probable results of combining a relatively small amount of alcohol with a prescription medication. The facts of Guzzi, which involved expert testimony on the effects of mixing alcohol and a prescription medicine, distinguish it from other decisions weighing the probative value of evidence of alcohol consumption against its prejudicial effect. Guzzi, therefore, is not dispositive of the issue presented in this case. Nevertheless, it is instructive that the Guzzi court admitted evidence of **[19]** intoxication, despite the absence of testimony of "excessive drinking, driving at an excessive speed, recklessness or erratic driving [or] drunken behavior at the scene." Guzzi, 252 N.J. Super. at 366. Significantly, the court concluded that the list of "supplementary evidence of intoxication," set forth above, was not exhaustive. The court

in Guzzi found the evidence of intoxication "highly probative" of why the defendant did not react more quickly with a "550-foot clear line of vision." Id. At oral argument on this motion, counsel for Honda produced photographs, exchanged by the parties during discovery in this case, showing that West Hunterdon Avenue was dry and the weather clear at or about the time of Hulmes's accident.

In Clement, Magistrate Judge Wolfson excluded evidence of alcohol consumption based upon a finding that a blood alcohol content of .051%, without any other "supplementary evidence," did not meet the Gustavson standard. Clement, 130 F.R.D. at 535. Magistrate Judge Wolfson's decision was affirmed, in part, on the basis of New Jersey's Motor Vehicle Law then in effect, under which blood alcohol levels ranging between .05% and .09%, instead of giving rise to a statutory presumption of intoxication, constituted only one **[20]** type of "competent evidence to be used in determining the guilt or innocence of the defendant." Clement v. Consolidated Rail Corp., NO. CIV. 88-3793, 1990 WL 49978 *2 (D.N.J. April 17, 1990) (citing N.J.S.A. § 39:4-50.1 (repealed)).

It is not clear, however, what effect the current New Jersey Motor Vehicle Code's irrebutable presumption of unfitness to drive with a BAC of .10% or higher has upon the admissibility of such evidence in a civil case.[3] Unlike some

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[3] N.J.S.A. § 39:4-50, in pertinent part, provides criminal penalties for:

> A person who operates a motor vehicle while under the influence of intoxicating liquor, ... or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of

states, New Jersey does not specifically limit the use of evidence of a probable violation of section 39:4-50 of its Motor Vehicle Code to criminal trials. See 1 James F. Mosher, Liquor Liability Law § 14.02[2] (Matthew Bender 1995) (identifying Arkansas, Connecticut, Kentucky, Minnesota and Louisiana as states that prohibit the use of the statutory presumption of intoxication in civil cases, **[21]** and Arizona, Florida, Georgia, Montana, Oregon, Vermont and Washington as states in which the statute specifically provides for a rebuttable presumption of intoxication in civil cases based on the statutory blood alcohol level).

In Straley v. United States, Judge Debevoise excluded evidence of the plaintiff's blood alcohol level, which was, by one calculation, as high as .12% at the time of the accident. Judge Debevoise noted that there was eyewitness testimony that Straley did not appear to be intoxicated at the time of the accident and no "on-the-scene evidence that Straley was actually impaired." Straley, 887 F.Supp. at 739.

In Straley, however, even the defense experts agreed that the .147 serum blood alcohol level taken at the hospital was probably an artificially high reading, due to Straley's considerable loss of blood following the accident. More importantly, all the experts in Straley apparently agreed that "it was likely Straley's blood alcohol was below .10% at the time of the accident." Id.

In this case, Hulmes's blood alcohol level can be determined only by extrapolation from the serum test

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> intoxicating liquor, ... to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood....

performed at Cooper Hospital upon his admission. Honda's [22] toxicology expert opines that Hulmes's BAC at the time of the accident would have been .11%. In his brief in opposition, plaintiff attaches a letter from Dr. William L. Mannion, which contests the findings of defendants' experts.[4] Dr. Mannion opines that plaintiff's blood alcohol "could have been significantly below the .10% level of legal intoxication at the time of the accident." Hulmes's Brief. exhibit C at 2. Finally, however, Dr. Mannion suggests only that the extrapolations made by the defendants' experts could be in error by plus or minus ten percent. This conclusion, however, does not cast significant doubt on the evidence that Hulmes's BAC was at or above the .10% level which constitutes a per se violation of N.J.S.A. § 39:4-50. Any doubt raised by Dr. Mannion's opinion goes to the weight of the testimony of the defendants' experts, rather than to its admissibility. At least one other court which has considered this issue has reached the same conclusion.

[23] Interpreting an Illinois rule similar to the Gustavson rule, the court in Cuellar v. Hout, 522 N.E.2d 322 (Ill. Ct. App. 1988), admitted disputed expert opinion testimony that the plaintiff's BAC was .104 at the time of the accident, holding that the expert opinion itself was "supporting evidence which 'either directly or by reasonable inference, [shows] that the conduct of [plaintiff] at and before the accident was or may have been affected by the use of alcoholic beverages.' " Id. at 327 (citations omitted). The Cuellar court, addressing facts similar to those before this

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[4] Dr. Mannion's letter is dated May 27, 1996. Defendants correctly point out that Dr. Mannion has not been identified as an expert in the pre- trial order. Honda's Brief at 14 n. 1. Therefore, Honda contends that this letter is hearsay which "should not be considered by this court." Id. On the contrary, Fed. R. Evid. 104(a) permits the court to consider otherwise inadmissible evidence in deciding a question of admissibility.

court, concluded that the plaintiff's attacks on the methodology of the expert's extrapolation went to the weight, and not the admissibility of such testimony. Id. at 326.

The question whether a BAC of .10% or higher may, in and of itself, constitute Gustavson-type "supplementary evidence" of intoxication is unsettled in New Jersey. In Clement, Magistrate Judge Wolfson declared her unwillingness "to infer that one is unfit to drive based solely on one's blood alcohol level--even when that level is extremely high." Clement, 130 F.R.D. at 535. Clement's BAC, however, was only .051%. More importantly, the view taken by Magistrate Judge Wolfson ignores the fact that a BAC of .10% or higher is, without more, irrebutable evidence of unfitness to drive.[5] In Straley, on the other hand, Judge Debevoise opined that "a clear showing that Straley's blood alcohol content at the time of the accident was above the .10% standard for legal intoxication might satisfy Gustavson's corroboration requirement." Straley, 887 F.Supp. at 739. Notably, Straley was riding upon, but not driving, a vehicle at the time he was injured. Arguably, the application of a statutory presumption of unfitness to operate a vehicle is somewhat less compelling in a civil case when the allegedly

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[5] In Clement, Magistrate Judge Wolfson cites Billow v. Farmers Trust Company, 266 A.2d 92 (Pa. 1970), noting that the Pennsylvania Supreme Court refused to find that a blood alcohol content of .14% implied impairment. In the same paragraph, however, Magistrate Judge Wolfson concedes that since Pennsylvania adopted its .10% statutory presumption of intoxication, the courts of the Commonwealth had been "giving greater consideration to admitting evidence of substantially elevated blood alcohol levels (levels in excess of .10 percent) on the question of unfitness to drive." Clement, 130 F.R.D. at 535 n. 8 (citing cases).

intoxicated plaintiff was not driving.[6] In this case, Hulmes was driving a motor vehicle [25] within the meaning on the New Jersey Motor Vehicle Code.[7] Cf. Locke v. Claypool, 627 A.2d 801, 803 (Pa. Super. Ct. 1993) (holding that statutory standards of intoxication apply equally to drivers of automobiles and to bicyclists, because, a bicycle is a "vehicle" under the Pennsylvania Motor Vehicle Code, which proscribes driving "vehicles" while under the influence of alcohol).

The question left unanswered in Straley and Clement is precisely the one confronting this court on this motion in limine. Can evidence of a blood alcohol content of .10%, or higher, with little or no additional corroborative evidence of intoxication, satisfy the Gustavson requirement for other "supporting evidence" of unfitness to drive?

Courts grappling with similar evidentiary rules in other states have come to inconsistent conclusions. For example, in Smith v. Deere & Co., CIV. A. No. 87-7998, 1989 WL 24903 (E.D.Pa. March 17, 1989), a suit against the product

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[6] In Straley, Judge Debevoise also barred evidence of drinking by the driver of the truck on which Straley was riding at the time of the accident. The driver's BAC, however, was not alleged to have been higher than .08% at the time of the accident. In barring evidence of alcohol use by the driver, Judge Debevoise again stated that "if [the driver] had tested above .10% blood alcohol content, that evidence might be sufficient under Gustavson to corroborate actual impairment and justify the introduction of evidence of his prior consumption of alcohol." Straley, 887 F.Supp. at 740.

[7] A "motor vehicle" is defined to include "all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks and motorized bicycles." N.J.S.A. § 39:1-1.

manufacturer, the court admitted evidence of a BAC of .1483%, which was accompanied only by the plaintiff's admission that he had been drinking prior to the accident, [26] as evidence of unfitness to drive a snowmobile. It is unclear, however, whether the court in Smith applied Fed. R. Evid. 403, or Pennsylvania law.

In Kempe v. Dometic Corp., 866 F.Supp. 817 (D.Del.1994), the court excluded evidence of plaintiff's blood alcohol level in a products liability suit. After discussing the difficulty of establishing the alcohol content of whole blood by extrapolation from a serum level, the court concluded that "the probative value of the serum alcohol is outweighed by its potential for unfair prejudice." Id. at 821 (citing Rovegno, 677 F.2d at 331). Curiously, however, the court admitted evidence that the plaintiff drank two cocktails prior to the accident because it concluded that such evidence "would not confuse or distract the jury." Id. Ultimately, it is unclear whether Kempe was decided on the basis of a Maryland rule of law which operates to exclude unsupported evidence of intoxication because of its prejudicial effect, or because the evidence was thought to be too "confusing" or because it might "mislead" the jury.

There is little "supplementary evidence" in this case of Hulmes's unfitness to drive. Applying Gustavson, this [27] court must decide which, if any, of the following proffered evidence, provides support for the admission of evidence intended to show that Hulmes's consumed alcoholic beverages prior to the accident:

1. Expert testimony that Hulmes's ATV was traveling at 35-40 m.p.h. at the time of the accident;

2. Testimony from the flight nurse that she suctioned an"amber liquid that smelled like alcohol" out of

Hulmes's stomach shortly after the accident;

3. Testimony that Nicholas Hulmes, Hulmes's brother, who had been with him all morning, was belligerent immediately following the accident;

4. Testimony that Hulmes had an unopened bottle of beer in his pants immediately following the accident;

5. Photographic evidence that the road was clear, flat and dry, and the weather clear at or about the time of the accident; and,

None of these facts, standing alone, would establish Hulmes's unfitness to drive, within the meaning of Gustavson. For example, while the presence of an "amber liquid that smelled like alcohol" in Hulmes's stomach is relevant to whether Hulmes had consumed alcoholic beverages, it is not, by itself, evidence of impaired ability to drive. Similarly, the presence of an unopened beer bottle in the waistband of plaintiff's pants is evidence that Hulmes had the opportunity to drink beer, but not evidence that he was intoxicated. Finally, the alleged belligerence of [28] plaintiff's brother is completely irrelevant to Hulmes's ability to drive.

Nevertheless, the types of "supporting evidence" most often discussed in the caselaw include some of the evidence available in this case. There was a smell of alcohol, if not exactly on Hulmes's breath, at least emanating from the contents of his stomach. Here, as in Cuellar, 522 N.E.2d at 323, there is disputed testimony that the plaintiff was travelling at an excessive speed at the time of the accident. Here, as in Guzzi, 252 N.J. Super at 366, there is a notable

absence of environmental factors which might otherwise explain the collision of the two ATVs. Finally, there is the testimony of Honda's toxicology expert that Hulmes's BAC at the time of the accident was over .10%.

Furthermore, many of the traditional indicia of intoxication, for example, slurred speech and difficulty in walking, are unavailable due to the peculiar and tragic facts of this case. There is no eyewitness testimony of Hulmes's physical and mental condition immediately prior to the accident, except that of his brother, who has testified that neither Hulmes, nor he, consumed alcohol on the day of the accident. The credibility of Nicholas Hulmes, however, [29] must be determined by the jury, and not by this court. Nevertheless, the fact that Nicholas Hulmes was apparently the only person to have been with the plaintiff immediately prior to the accident, highlights one of the difficulties of producing "supplementary evidence" of intoxication under the factual circumstances of this case.

Upon their arrival on the accident scene, paramedics quickly intubated Hulmes with an endotracheal tube and ventilated him with a bag and mask resuscitator until they were relieved by the helicopter evacuation team. Throughout this time, Hulmes was immobilized on a back board. Under these circumstances, the smell of Hulmes's breath, the fluidity of his speech and his physical coordination could not be observed.

In sum, the severity of Hulmes's injuries has created an understandable absence of the typical "supplementary evidence" of intoxication which might otherwise be expected from eyewitnesses at the scene. Other types of "supplementary evidence," however, are available, including the speed of the ATVs and the apparent absence of adverse road or weather conditions. In light of this "supplementary evidence," and, most importantly, the conclusions of two [30]

defense experts regarding the plaintiff's BAC at the time of the accident, I conclude, applying New Jersey law, that the evidence of Hulmes's consumption of alcohol on the day of the accident is admissible. The potential for undue prejudice resulting from the admission of the blood alcohol test results does not substantially outweigh the probative value of this evidence.

Accordingly, I answer the question left open by Judge Debevoise in Straley by predicting that the New Jersey Supreme Court would admit evidence of a blood alcohol content of .10% or higher as independent "supplementary evidence" of unfitness to drive under the Gustavson test.[8] This conclusion is bolstered by the irrebutable presumption contained in N.J.S.A. § 39:4-50. Under New Jersey's statutory scheme, a blood alcohol content of .10% or higher, serves as a sufficient substitute, in and of itself, for other direct evidence of intoxication. Compare State v. Morris, 262 N.J. Super. 413 (App. Div.1993) (evidence was sufficient without a blood test to show that defendant was "under the influence" when defendant's speech was slurred, **[31]** he was loud and abrasive; he appeared disheveled, his eyes were red and bloodshot, and there was a strong odor of alcohol on his breath), with State v. Oriole, 243 N.J.Super. 688 (L. Div.1990) (a defendant whose BAC is .10% or higher may be convicted without any showing that he or she was driving in a reckless manner).

III. Authentication of the Blood Alcohol Test Results

Plaintiff further contends that even if the evidence of intoxication is otherwise admissible, it should be excluded

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[8] Although I reach this conclusion by applying New Jersey's evidentiary law in accordance with Rovegno, I would reach the same result were I to apply Fed. R. Evid. 403.

because Honda cannot establish a proper chain of custody for the blood sample. Honda responds that any doubt as to the chain of custody of the Hulmes blood sample goes to the weight, rather than the admissibility, of this evidence.

Plaintiff asserts that Honda cannot properly authenticate the blood alcohol test results from Cooper Hospital under Fed. R. Evid. 901(a), which requires, "as a condition precedent to admissibility[,] ... a finding that the matter in question is what its proponent claims." The Third Circuit has noted that, under Rule 901:

> 'the showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility. Once a prima facie case is made, the evidence goes to the jury and it is the jury **[32]** who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.'

United States v. McGlory, 968 F.2d 309, 328-29 (3d Cir.1992) (quoting Link v. Mercedes-Benz of North America, 788 F.2d 918, 928 (3d Cir.1986), in turn quoting United States v. Goichman, 547 F.2d 778, 784 (3d Cir.1976)). The threshold determination which this court must make, therefore, is one of "conditional relevance under [Fed. R. Evid.] 104(b)--subject to the jury's ultimate determination of genuineness." 5 Weinstein et al., supra ¶ 901(a) [01], at 901-19.

Depositions have been taken of those persons who are

routinely involved in the collection, testing, and analysis of blood samples taken at Cooper Hospital. Barbara L. Snyder, who was a senior technologist in the Cooper Hospital chemistry laboratory at the relevant time, testified extensively as to the procedures followed in testing blood samples at Cooper. Dep. of B. Snyder at 23-44. Ms. Snyder testified as to the procedures followed in the hospital's trauma unit in collecting and labeling blood samples. Id. at 23-24. Prepared packages available to personnel in the **[33]** trauma unit contain, among other things, pre-numbered vials for blood samples and an identity band having the same number, which will be worn by the patient. Id. This attention to careful preparation renders it unlikely that blood samples of patients will be confused. "The proponent of evidence 'need not rule out every conceivable chance that somehow the identity or character of the evidence under went change.' " Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1155 (5th Cir.1981) (quoting United States v. Lane, 591 F.2d 961, 962 (D.C.Cir.1979)).

Plaintiff attaches significance to the fact that Ms. Snyder was unable to say at what precise time the ethanol test was run on Hulmes's blood sample. Dep. of B. Snyder at 103. Apparently, the records noting the exact time the test was conducted, along with the quality control records for the test equipment, no longer existed at the time of Ms. Snyder's deposition as a result of Cooper Hospital's routine document retention procedures. Nevertheless, Ms. Snyder testified that it was Cooper Hospital's policy that blood tests were run within one hour of receiving the blood sample. Id.

[34] I find that the chain of custody of plaintiff's blood sample meets the evidentiary threshold of reliability set forth in Goichman, and that a reasonable juror could infer that the

blood alcohol test results are authentic.[9] Naturally, the strength of the chain of custody can be tested on cross-examination and the jury will ultimately decide the authenticity, as well as the probative value of this evidence.

[35] IV. Conclusion

For the reasons set forth above, plaintiff's motion to exclude all references to alcohol consumption by Robert T. Hulmes will be denied. The court will enter an appropriate order.

/S/ STEPHEN M. ORLOFSKY
STEPHEN M. ORLOFSKY
United States District Judge

Dated: July 22, 1996

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[9] Although I am convinced that the "chain of custody" in this case is sufficiently reliable to permit the introduction of the results of Hulmes's blood test, it is noteworthy that some courts have ruled that blood tests conducted as a routine matter in a hospital are admissible under Fed. R. Evid. 803(6), which does not require the proponent to establish a "chain of custody." See Stroud v. Roper Corp., No. 88 Civ. 1093(KMW), 1990 WL 115610 *3 (S.D.N.Y. Aug. 9, 1990) (holding that, absent specific evidence of error in the blood testing procedure, hospital records benefit from a presumption of trustworthiness); Pieters v. B-Right Trucking, Inc., 669 F.Supp. 1463, 1465-66 (N.D. Ind.1987) (holding that Fed. R. Evid. 803(6) "does not impose an additional requirement that chain of custody be demonstrated").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	HON. STEPHEN M. ORLOFSKY CIVIL ACTION NO. 93-2771. CONSOLIDATED ACTIONS OPINION
SHERRY HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	

[Opinion of the District Court dated August 12, 1996]

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ORLOFSKY, District Judge:

Plaintiff, Robert T. Hulmes ("Hulmes," or the "plaintiff"), filed this product liability action against defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., [3] and American Honda Motor Company, Inc. (collectively referred to as "Honda"). Plaintiff has filed a motion requesting certification under 28 U.S.C. § 1292(b) of this court's Order, filed on July 22, 1996 (the "Order"), denying plaintiff's motion in limine seeking to bar evidence of Hulmes's alcohol consumption immediately prior to the tragic accident which gives rise to this case. Plaintiff has also applied to this court for a stay under § 1292(b). Because this court is not of the opinion that an interlocutory appeal of the Order in question is appropriate, certification and a stay will both be denied.

I. Interlocutory Appeal Under Section 1292(b)

Section 1292(b) provides for immediate appeal of interlocutory decisions of the district court under the following circumstances:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

> termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings [4] in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

Interlocutory appeal under § 1292(b) is "used sparingly in exceptional" cases. 16 Charles A. Wright, et al., Federal Practice and Procedure, § 3929, at 134 (1977). An appeal under this section is an exception to the important policy of avoiding "piecemeal appellate review of trial court decisions which do not terminate the litigation." United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982).

In order to merit interlocutory review, a movant must point to: (1) a controlling question of law, (2) about which there is substantial ground for difference of opinion, the immediate resolution of which by the appeals court will (3) materially advance the ultimate termination of the litigation. In evaluating these factors, "the court must remember that ... [a] motion should not be granted merely because a party disagrees with the ruling of the district judge." Max Daetwyler Corp. v. Meyer, 575 F.Supp. 280, 282 (E.D.Pa.1983); see also United States v. Grand Trunk Western R.R., 95 F.R.D. 463, 471 (W.D.Mich.1981) (denying [5] certification because the moving party "merely questions the correctness" of the court's ruling).

A question is "controlling" if its incorrect disposition would require reversal of the final judgment. Katz v. Carte Blanche Corp., 496 F.2d 747, 755 (3d Cir.1974). It is clear that this court's Order, if held to be error on plaintiff's appeal from an adverse verdict, would probably require a new trial. Nevertheless, a "controlling" question under § 1292(b) must also be a question "of law," and it must be a question about which there is "substantial ground for difference of opinion."

A party's disagreement with the district court's ruling does not constitute a "substantial ground for difference of opinion" within the meaning of § 1292(b). Rather, the difference of opinion must arise out of genuine doubt as to the correct legal standard. Indeed, one court in this Circuit refused to certify a previously undecided issue of law because it found the statutory language to be clear, even in the face of a squarely contradictory ruling on the same issue from another district court. See Singh v. Daimler- Benz, AG, 800 F.Supp. 260 (E.D.Pa.1992) (holding that the amendment to the diversity jurisdiction statute **[6]** which defined a permanent resident alien as a citizen for diversity purposes gave the federal court subject matter jurisdiction over a case brought by a permanent resident alien against a nonresident alien).

Furthermore, Judge Newcomer explained that an interlocutory appeal in Singh would only materially advance the ultimate termination of the litigation "if the Third Circuit concludes that this court does not have jurisdiction over this case, [but] if the Third Circuit finds that this court does in fact have jurisdiction, the litigation will not be advanced, but will instead will be considerably delayed." Id. at 263. Judge Newcomer was prescient in focusing on the risk of unnecessary delay. On appeal from the final judgment in Singh, the Third Circuit affirmed the district court, holding that the diversity jurisdiction statute, as amended, gives federal courts subject matter jurisdiction over cases brought

by permanent resident aliens against alien defendants. Singh v. Daimler-Benz AG, 9 F.3d 303 (3d Cir.1993).

[7] II. Discussion

A. A Controlling Question of Law

It is perhaps an all too common failing among attorneys that, under the guise of zealously discharging their professional duties to their clients, they claim the prerogative of Humpty-Dumpty, who said: "When I use a word, ... it means just what I choose it to mean--neither more nor less." Lewis Carroll, Through the Looking-Glass and What Alice Found There 163 (Norton ed. 1971). Plaintiff's counsel, in this instance, however, has surpassed Humpty-Dumpty, because for plaintiff's counsel, when the court uses a word, it means just what plaintiff's counsel chooses it to mean, and nothing else.

In an attempt to obtain immediate appellate review of this court's Order, plaintiff's counsel has manufactured a "controlling question of law" out of whole cloth. Plaintiff's true purpose is transparently evident in the manner in which counsel has phrased what he contends to be the "controlling question of law" in this case as to which there is "substantial ground for difference of opinion." **[8]** Plaintiff's counsel asks this court to certify the following question:

> Whether the Court in this diversity case erred by failing to apply either the holding of the "leading" New Jersey appellate decision, Gustavson, which requires the use of an "unfitness to drive" test in determining the admissibility of alcohol evidence, and the holding of Rovegno, which expressly mandated the use of a state's "unfitness to drive" test in diversity cases; and by instead

> adopting a relaxed standard based on Rule 403, Fed. R. Evid., through which the Court admitted evidence of plaintiff's alcohol use based solely on defendant's expert testimony of .10% or .11% BAC.

Plaintiff's Notice of Motion at 2-3 (citations omitted). The obvious problem with this statement of the question to be certified is that, in reaching its decision, this court applied New Jersey's "unfitness to drive" standard, as articulated in Gustavson v. Gaynor, 206 N.J. Super. 540 (App. Div.1985), certif. denied, 103 N.J. 476, 511 A.2d 655 (1986), and, thereby, fully complied with the Third Circuit's mandate in Rovegno v. Geppert Bros., Inc., 677 F.2d 327, 329 (3rd Cir.1982).

Plaintiff's suggestion to the contrary is wholly unsupported by this court's Opinion of July 22, 1996, which described and relied upon the holdings of Gustavson; Guzzi v. Clarke, 252 N.J. Super. 361 (L. Div.1991); Clement v. Consolidated Rail Corp., 130 F.R.D. 530 (Wolfson, M.J.), [9] aff'd, NO. CIV. 88-3793, 1990 WL 49978 (D.N.J. April 17, 1990) (Fisher, J.); and Straley v. United States, 887 F.Supp. 728, 732-39 (D.N.J.1995). Indeed, Straley is the most recent published discussion of New Jersey's "unfitness to drive" rule. Opinion filed July 22, 1996, at 201- 203. This court agreed with Judge Debevoise "that the Third Circuit meant what it said in Rovegno, and that, 'on the question of alcohol consumption, [Rovegno] requires the application of state law rules of admissibility.' " Id. at 200 (quoting Straley, 887 F.Supp. at 737).

This court cited, as persuasive authority, one other state appellate case applying a similar "unfitness to drive" standard. Cuellar v. Hout, 522 N.E.2d 322 (Ill. Ct. App.), appeal denied, 530 N.E.2d 242 (Ill. 1988). Slip Op. at 23, 28. This court also discussed, without relying upon them,

other cases decided within this Circuit. Smith v. Deere & Co., CIV. A. No. 87-7998, 1989 WL 24903 (E.D.Pa. March 17, 1989); Kempe v. Dometic Corp., 866 F.Supp. 817 (D. Del.1994). Slip Op. at 25-26. Finally, having applied New Jersey's "unfitness to drive" standard to the facts of this case, this court concluded in a footnote: "Although I reach [10] this conclusion by applying New Jersey's evidentiary law in accordance with Rovegno, I would reach the same result were I to apply Fed. R. Evid. 403." Slip Op. at 30, n. 8.

It is fair to say that this court, in its Opinion, criticized the Third Circuit's decision in Rovegno, as have other Circuits and commentators. See Slip Op. at 9-12. It cannot be said fairly that this court did not follow Rovegno. This, however, is precisely what plaintiff contends. Indeed, Plaintiff has asked this court to certify for interlocutory appeal a question that it did not decide.

Plaintiff bases his contention that this court applied Fed. R. Evid. 403, instead of New Jersey law, on the following reference: "while Rovegno instructs me to apply New Jersey law to decide this issue, I may also look to the decisions of federal courts applying Rule 403 in balancing the probative value of evidence of alcohol consumption against the potential prejudicial effect of such evidence." Slip Op. at 13-14. This conclusion was not suggested, as plaintiff argues, by the Third Circuit's observation that "in interpreting [Pennsylvania's 'unfitness to drive' rule] we may draw on our own decisions dealing with review of rule 403 exercises," but rather by the Third Circuit's [11] recognition, in the previous sentence, that Pennsylvania law "implicitly requires the same discretionary weighing required by Rule 403." Rovegno, 677 F.2d at 329. This court merely noted, therefore, that New Jersey "explicitly" requires the same kind of balancing, insofar as it has adopted the language of the Federal Rules of Evidence in N.J. R. Evid. 403. See Slip Op. at 13. This was nothing more than an observation about the similarity in the

type of discretionary balancing required by the federal rules and by state law. It was demonstrably not a choice by this court to apply the federal rule instead of New Jersey decisional law. It is one thing to note the similarity of the balancing test under either the state or federal rules, it is quite another thing to reject the state case law that determines the outcome of that test. In context, it is clear that this court applied New Jersey law.

Plaintiff's counsel does not, because he cannot, point to any case relied upon by this court in its Opinion applying Fed. R. Evid. 403 instead of the relevant state's "unfitness to drive" test. For example, in discussing the Rovegno decision, and particularly that decision's reception outside the Third Circuit, this court cited McInnis v. **[12]** A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985). However, this court nowhere relied upon McInnis in deciding the issue of the admissibility of the evidence of plaintiff's alcohol consumption in this case.

B. Substantial Ground for Difference of Opinion

Plaintiff's statement of the "controlling question of law" is disingenuous. Moreover, there is, in this case, no "substantial ground for difference of opinion" as to the applicable law. Plaintiff is in complete agreement with this court that Rovegno and Gustavson are controlling. In light of this agreement, it is clear that plaintiff's request for certification under § 1292(b) reflects nothing more than his disagreement with this court's application of the governing law to the relevant facts of this case. Section 1292(b) was not designed to secure appellate review of "factual matters" or of the application of the acknowledged law to the facts of a particular case, matters which are within the sound discretion of the trial court. Link v. Mercedes-Benz, 550 F.2d 860, 863 (3d Cir.1977); see also Fechter v. Connecticut General Life Ins. Co., 800 F.Supp. 178, 181 (E.D.Pa.1991).

[13] In deciding the question of the admissibility of evidence of plaintiff's alcohol consumption in this case, this court faced the task of applying a New Jersey evidentiary rule, which has only been discussed by one New Jersey appellate court and one state trial court,[1] to a complex factual scenario. This alone, however, does not justify interlocutory appeal. I concur with those courts which have found that § 1292(b) "is not intended as a vehicle to provide early review of difficult rulings in hard cases." Abortion Rights Mobilization, Inc. v. Regan, 552 F.Supp. 364, 366 (S.D.N.Y.1982).

At least one court has held that "it is improper to certify a question of state law to the United States Court of Appeals for interlocutory review." Cummins v. EG & G Sealol, Inc., 697 F.Supp. 64 (D.R.I.1988). The Cummins court noted the following dilemma, which is implicit in the certification of state law questions under § 1292(b):

> If, on the other hand, this Court were to grant § 1292(b) certification, the [Circuit Court of Appeals] would find itself in no better position to make a determination concerning state law than this Court now finds itself. In fact, it is quite likely that the Court of Appeals, should **[14]** it accept the interlocutory appeal, would feel compelled to itself certify the state law issue to the Rhode Island Supreme Court. The delay that would be caused by such a circuitous certification route, of an issue that may become moot, would be inefficient for the

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[1] See Gustavson v. Gaynor, 206 N.J. Super. 540 (App. Div.1985), certif. denied, 103 N.J. 476 (1986); Guzzi v. Clarke, 252 N.J. Super. 361 (L. Div.1991).

courts involved and unfair to the litigants.

Id. In reaching this conclusion, the Cummins court reflected on the history of Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir.1985), in which the district court certified questions of Louisiana state law under § 1292(b), which the Fifth Circuit, in turn, certified to the Louisiana Supreme Court, which declined to accept certification. As the Cummins court pointed out, "in Perkins, after yet more delay, the Fifth Circuit was compelled to decide the state law issue anyway. Had the Fifth Circuit held that a cause of action did exist, remand to the district court would have been necessary with the possibility of another appeal regarding other issues after a final judgment." Cummins, 697 F.Supp. at 71.

The Cummins court decided to reserve all state law questions for certification to the Rhode Island Supreme Court after trial. Alas, this court is without that option, as New Jersey has no certification procedure. The absence of such a procedure guarantees that, were this question to **[14]** be certified under § 1292(b), the Third Circuit would be forced to predict whether this court's prediction of the New Jersey Supreme Court's probable ruling, if faced with the facts of this case, was correct.[2] I respectfully suggest that the Third

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[2] For a discussion of the virtues of state certification procedures, see Hakimoglu v. Trump Taj Mahal Assoc., 70 F.3d 291, 302-04 (3d Cir.1995) (Becker, J., dissenting, joined, in this part of his dissent only, by Nygaard and Alito, JJ.) (describing the overwhelming satisfaction of federal judges with state certification procedures where they exist and urging New Jersey to adopt certification). Judge Becker quotes at length from an article by Chief Judge Sloviter, in which she demonstrates the fallibility of the Court of Appeals in predicting state law. Id. (quoting Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va.L.Rev. 1671, 1679-80 (1992)). In an earlier decision in this very case, I

Circuit is in no better position to make such a prediction than is this court.

C. Materially Advance the Ultimate Termination of the Litigation.

Finally, plaintiff has failed to persuade this court that immediate appeal will "materially advance the ultimate termination of the litigation." Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.1974), is a good example of how certification can "materially advance" the litigation. In Katz, the district court certified a class of approximately 800,000 Carte Blanche cardholders pursuant to Fed. R. Civ. P. 23(b)(3), and simultaneously certified its order under [16] § 1292(b). Carte Blanche, which opposed the class certification, prevailed on interlocutory appeal. As a result of the Third Circuit's ruling on interlocutory appeal, the case could be tried in the district court by a single plaintiff, rather than as a class action, with the attendant delays caused by the notice provisions and the close judicial scrutiny that is mandated by Fed.R.Civ.P. 23.

Thus, the character of the underlying litigation in Katz, and the time that it would take to pursue it, were significantly altered by the Third Circuit's decision. On the other hand, had the Third Circuit affirmed the class certification on interlocutory appeal, the underlying litigation would not have been excessively delayed, principally because the class certification question arose early in the procedural history of the case. In Katz, therefore, from the point of view of the district court, there was much to gain and little to lose by granting leave to take an interlocutory appeal.

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also had occasion to agree with Judge Becker on the desirability of the adoption of a certification procedure in New Jersey. See Hulmes v. Honda Motor Co., 924 F.Supp. 673, 678 (D.N.J.1996).

By contrast, this action arises out of an accident which took place on July 28, 1991. This case has been proceeding in this court since 1993. Discovery has finally [17] been concluded. Trial in this matter is scheduled to commence on September 16, 1996. If this question were certified, and a stay granted, under § 1292(b), trial would be postponed for an indefinite period. Ultimately, of course there would be a trial in this matter, and that trial would be of approximately the same duration as it would have been had no interlocutory appeal been taken.

In view of all these factors, it is clear that interlocutory appeal at this time will not materially advance the litigation, but rather, will result in further delay. At oral argument, plaintiff's counsel noted, in passing, that if his proposed question were certified for interlocutory appeal and this court were affirmed by the Third Circuit, then plaintiff would be proven wrong on the substantive New Jersey law. But, as plaintiff's counsel failed to acknowledge, this scenario would also mean that the trial in this matter would be needlessly delayed while the Third Circuit considered this question of state law. "Delay is a particularly strong ground for denying appeal if certification is sought from a ruling made shortly before trial." Baranski v. Serhant, 602 F.Supp. 33, 36 (N.D. Ill.1985). See also Singh, 800 F.Supp. at 263.

[18] In the final analysis, plaintiff's motion for certification fails because counsel has taken out of context, and distorted the clear language of this court's Opinion.

As Judge Learned Hand once observed:

> Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting

in which they are used . . . .

NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir.1941). Quod erat demonstrandum.

Because plaintiff has failed to meet the requirements of § 1292(b), his request for interlocutory appeal will be denied. Accordingly, there is no need to entertain plaintiff's application for a stay of proceedings in this action. The Court will enter an appropriate order.

/S/ STEPHEN M. ORLOFSKY
STEPHEN M. ORLOFSKY
United States District Judge

Dated: August 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	HON. STEPHEN M. ORLOFSKY CIVIL ACTION NO. 93-2771. CONSOLIDATED ACTIONS OPINION
SHERRY HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	

[Opinion of the District Court dated March 11, 1997]

* * * *

ORLOFSKY, District Judge.

This product liability lawsuit against defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc. (collectively referred to as "Honda") was tried before this court and a jury from September 24, 1996, through October 31, 1996. The jury returned a special verdict in which it found no design defect in the subject All Terrain Vehicle ("ATV"). However, the jury found the ATV defective by reason of a failure to warn. In response to special interrogatories requesting an allocation of comparative fault, the jury found the plaintiff, Robert Hulmes ("Hulmes" or the "plaintiff"), sixty-six (66) percent at fault for his injuries. On October 31, 1996, the court entered judgment in favor of defendants on all counts pursuant to N.J. Stat. Ann. §§ 2A:15-5.1 and 15-5.2. Judgment was also entered against Sherry Hertlein, Hulmes's former spouse, on her derivative per quod action.

Plaintiff now moves to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), or, alternatively, for a new trial pursuant to Fed. R. Civ. P. 59(a).[1] Plaintiff's motions

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[1] Rule 59 provides, in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a

require this court to revisit and plumb once again the murky depths of New Jersey's Product Liability Law. For the reasons set forth below, plaintiff's motions will be denied.

I. Standards Governing Rule 59 Motions

The decision whether to grant a new trial pursuant to Federal Rule of Civil Procedure 59(a) lies within the district court's sound discretion. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980); Wagner v. Fair Acres Geriatric Ctr., 49 F.3d 1002, 1017 (3d Cir.1995). Errors in judicial rulings or in the conduct of the court warrant a new trial where the error or conduct was prejudicial. 6A James Wm. Moore, Moore's Federal Practice § 59.08(2) (2d ed.1996). However, even if the court determines that an error was made, it should not grant a new trial unless it also determines that the error was so prejudicial that "refusal to take such action appears to the court inconsistent with substantial justice." Fed. R. Civ. P. 61. See also Bhaya v. Westinghouse Elec. Corp., 709 F.Supp. 600, 601 (E.D.Pa.1989), aff'd, 922

> jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
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> . . . .
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> (e) Motion to Alter or Amend Judgment. Any motion to alter or mend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59.

F.2d 184 (3d Cir.1990).

Under Federal Rule of Civil Procedure 59(e), a district court may alter or amend a judgment: (1) when there has been an intervening change in the law; (2) when new evidence becomes available only after trial; (3) if the court has committed clear legal error; or (4) if the judgment without amendment would create a manifest injustice. North River Ins. Co. v. Cigna Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir.1995). Hulmes offers no new evidence, nor does he claim that there has been a change in the controlling law. Rather, plaintiff contends that this court has committed clear legal error.

Courts should not lightly disturb jury verdicts. "In reviewing the propriety of a jury verdict, [this Court's] obligation is to uphold the jury's award if there exists a reasonable basis to do so." Motter v. Everest & Jennings, Inc., 883 F.2d 1223, 1230 (3d Cir.1989). See also Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 325 F.2d 2, 21 (3d Cir.1963). This court must defer to the jury whenever its findings are reasonably supported by the record, and must draw all reasonable inferences in favor of the verdict winner. Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir.1987) (citing Massarsky v. General Motors Corp., 706 F.2d 111, 117 (3d Cir.1983)).

II. Discussion

Because plaintiff's motion to alter or amend the judgment and his motion for a new trial are both, in part, based on his assertion that this court misapplied the comparative fault provisions of New Jersey's product liability law, I will briefly discuss this issue before turning to plaintiff's other contentions.

The product liability law of New Jersey recognizes

that accidental injuries are often the result of a combination of causes. However, the doctrine of strict liability strikes a balance in favor of plaintiffs by requiring a defendant to produce evidence that the plaintiff voluntarily encountered a known danger, before the jury is allowed to compare the plaintiff's conduct with the alleged product defect on the question of causation. Cartel Capital Corp. v. Fireco of N.J., 81 N.J. 548, 562-63 (1980). This balance advances the overall purpose of New Jersey's product liability law by stressing the manufacturer's primary responsibility to design and market safe products. Nevertheless, when the evidence points to a voluntary assumption of a known risk, it is proper to instruct the jury on comparative fault. Ladner v. Mercedes-Benz, 266 N.J. Super. 481, 495 (App.Div.1993), certif. denied, 135 N.J. 302 (1994).

Hulmes asks this court to amend the judgment so as to award him damages based upon the jury's finding that the ATV was defective by reason of a failure to warn, notwithstanding the jury's finding as to his comparative fault, which Hulmes argues is "irrelevant" to his failure to warn claim. Alternatively, plaintiff seeks a new trial based upon his contention that his is not a case to which comparative fault properly applies.

A. Plaintiff's Motion to Alter or Amend the Judgment

Hulmes first contends that he is entitled to judgment in his favor based upon the jury's finding of a failure to warn, and asks this court to enter judgment in the full amount of the jury's verdict. Plaintiff argues that the jury's assignment of comparative fault is irrelevant on the question of defendants'

failure to warn.[2]

At trial, Hulmes claimed not to have received certain warnings which were distributed by Honda some years after he had purchased his ATV. Hulmes testified that, had he received these warnings concerning the ATV's safety, he "would have got rid of it." Tr. of Oct. 1, 1996, part A, at 42. The jury found that the ATV was defective by reason of Honda's failure to warn of the danger of severe injury which could result from roll-over or tip-over accidents in which the rider is jettisoned. Plaintiff argues that comparative fault is inapplicable "where the harm incurred is the very risk about which defendant had a duty to warn." Crispin v. Volkswagenwerk AG, 248 N.J.Super. 540, 565 (App.Div.), certif. denied, 126 N.J. 385 (1991).

In Crispin, the trial court declined to reduce the jury's award by the 25 percent by which the jury had found the plaintiff at fault. Id. at 549. The trial court based its decision upon the fact that the jury had found the defendant liable on a failure to warn theory. Id. The Appellate Division affirmed, while stressing that the case was "unique" because it presented a pure "second collision" scenario. Id. at 564, 567. In a "crashworthiness," or "second collision" case, the jury is only concerned with the incremental injuries suffered as the result of the defect. In Crispin, the jury found that Volkswagen failed to warn the plaintiff that the use of a seat belt was especially necessary "in light of the collapsing seat, a feature built into the automobile by design." Id. at 565. The Appellate Division concluded that, because the only damages at issue were those that resulted from the "second collision," the plaintiff's contributory fault "in causing the original

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[2] Elsewhere, Hulmes contends that it was error to give the charge on comparative fault, even as to his claim of design defect. This contention is addressed, and refuted, in part II.B.4, infra.

accident was not at issue." Id. at 568 (emphasis added)

In the singular context of "second collision" injuries, a defendant's failure to warn a user of its product of a "special requirement," without which the product will be unsafe, may well preclude consideration of comparative fault. In Crispin, the Appellate Division concluded that the plaintiff should not be penalized for failure to use a seat belt when the special importance of using a seat belt in view of the automobile's peculiar seat design was not conveyed to him. By contrast, the warning which Honda failed to deliver to Hulmes, Exhibit P-524, did not outline any specific action or steps that Hulmes should have taken to avoid the accident in question. It merely warned, albeit in some detail, that roll-over or ejection accidents were a possible result of even a minor collision. This is simply not a case in which application of comparative fault principles would, in effect, blame the plaintiff for not doing something which he was not told he should do. On the contrary, plaintiff's testimony that he would have "gotten rid" of the ATV had he been warned of its instability, belies his assertion that this case is controlled by Crispin. Hulmes's accident was not "caused" by his failure to "get rid" of the ATV, except in the most tenuous sense, nor was it shown at trial that the absent warning would have urged ATV owners to dispose of their ATVs.

Moreover, the plaintiff's failure to use a seat belt was the only contributing cause on the plaintiff's part which was asserted in Crispin. Here, evidence was presented that Hulmes was riding his ATV while intoxicated, that he was exceeding the speed limit on a paved road, and that he collided with his brother's all terrain vehicle.

Crispin was further vindicated by the jury's finding that the seat design was defective. The jury in this case found no design defect in the Honda ATV. Plaintiff's failure to warn theory, on which the jury held the defendants liable, did not

encompass warnings against riding while intoxicated, which warnings were certainly given, or warnings against driving at excessive speed. In sum, there is an insufficient nexus between the defendants' failure to warn Hulmes of the need to exercise caution when riding his ATV, and Hulmes's comparative fault in causing the accident to sustain the comparison with Crispin.

Plaintiff also argues that the "heeding presumption" enunciated in Coffman v. Keene Corp., 133 N.J. 581 (1993), sets forth an independent comparative fault analysis, which displaces traditional comparative fault and renders any instruction on comparative fault erroneous. Plaintiff's Brief at 12-13. In essence, plaintiff suggests that when a jury finds a failure to warn defect and, in addition, finds that the defendant has failed to rebut the "heeding presumption," a directed verdict in plaintiff's favor is mandated. The "heeding presumption," however, does not sweep so broadly.

Coffman held that the failure to rebut the "heeding presumption" "may constitute proof that a defendant's failure to warn contributed to the plaintiff's injuries." Coffman, 133 N.J. at 591. Coffman was a multiple defendant asbestos case. The jury was instructed to apportion liability among the nine defendants.[3] It is not clear that the jury in Coffman apportioned any fault to the plaintiff.

On appeal, Keene Corp. argued that the burden should be upon the plaintiff to prove that he would have heeded a proper warning and thereby avoided the inhalation of asbestos fibers. The Supreme Court of New Jersey rejected this argument, deciding as a matter of public policy to place the burden on the manufacturer to rebut a presumption that the plaintiff would have heeded a proper warning. Id. at 603. In

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[3] Keene Corp., the only defendant to appeal, was assigned fifteen (15) percent of the causative fault. Coffman, 133 N.J. at 593.

dicta, the Coffman court seems to equate evidence of the comparative fault of the plaintiff with evidence which would rebut the "heeding presumption." Id. This is unsurprising, in that a defendant will normally produce evidence of the plaintiff's comparative fault on all issues relating to causation, including the "heeding presumption." Coffman simply did not address a plaintiff's comparative fault in the context of multiple causative factors.

In this case, the jury was charged that unless Honda succeeded in rebutting the heeding presumption, it must find that the "plaintiff has demonstrated that the inadequate warning was a proximate cause of his injuries." Tr. of Oct. 23, 1996 at 78. Even after giving Hulmes the benefit of the "heeding presumption," the jury was not required to find that the failure to warn was the sole proximate cause of Hulmes's injuries.

In this case, the jury heard evidence that Hulmes made modifications to his ATV to increase its performance, that Hulmes was riding at an excessive speed, and that Hulmes had consumed alcohol shortly before his tragic accident. In light of all the evidence, the jury could have concluded that the failure to warn, even though it was one proximate cause of the plaintiff's injuries, was not the sole, or even the major contributing factor in causing the accident.

In his reply brief, plaintiff restates his arguments, again suggesting that to sustain the jury's verdict for the defendants in this case would allow "mere negligence" on the plaintiff's part to support the defense of comparative fault. Reply Brief at 6-7. This is not so.

Plaintiff is correct that in strict product liability cases, as a general rule, once the jury has found that the defect was a substantial causative factor, the proximate cause inquiry is at an end and the defendant is liable. However, where the

evidence supports a charge on comparative fault, that is, where there is competent evidence that the plaintiff voluntarily encountered a known danger, the proximate cause inquiry must continue. In this case, the jury proceeded to compare the fault of the plaintiff with that of the defendants in causing the accident. It was required to do so because there was evidence from which it could have concluded that Hulmes, an experienced ATV rider, knew of the danger from riding while intoxicated, that he knew of the risk of injury from a collision, and that he proceeded in spite of these "known dangers." That there may have been some other danger highlighted in P-524[4] [FN4] which was not then known to plaintiff does not mean that Hulmes did not voluntarily encounter a known danger. It merely proves that he did not voluntarily encounter the danger described in P-524. Based upon the evidence presented, the jury allocated to Honda thirty-four (34) percent of the fault for causing the accident, the amount which the jury found was related to Honda's failure to warn.

It is telling that plaintiff maintains that the jury's finding of liability for a failure to warn and its allocation of fault are not "inconsistent" verdicts. See Reply Brief at 5 n. 3. Rather, plaintiff insists that the allocation of fault is simply "irrelevant" in a failure to warn case. Id.; see also Plaintiff's Brief at 2. This argument proves too much. Several New Jersey cases support the application of comparative fault principles to a failure to warn case. See Ladner, 266 N.J. Super. 483; Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 592 (App. Div.1994); Butler v. PPG Indus., 201 N.J. Super. 558, 564-65 (App. Div.1985). If Hulmes were correct that a comparison of a plaintiff's and defendant's degrees of

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[4] P-524 is a warning issued to ATV owners by Honda through its dealers pursuant to a consent decree with the Consumer Products Safety Commission. Hulmes apparently never received this warning at the time it was issued.

causative fault is always irrelevant once the jury has found a failure to warn, these cases would presumably say so. They do not so hold.

Because the plaintiff has failed to demonstrate that the jury's assignment of sixty-six (66) percent of the causative fault to the plaintiff was inconsistent with its finding that a failure to warn was a proximate cause of the accident, plaintiff's motion to alter or amend the judgment will be denied.[5]

B. Plaintiff's Motion for a New Trial

In support of his motion for a new trial, plaintiff claims that this court erred in ruling on several evidentiary issues, and in its instructions to the jury. Plaintiff also contends that the verdict was against the weight of the evidence and that the trial was fundamentally unfair.

"Where a contention for a new trial is based on the admissibility of evidence, the trial court has great discretion.. which will not be disturbed on appeal absent a finding of abuse." Link v. Mercedes-Benz, 788 F.2d 918, 921 (3d Cir.1986). On a claim that the trial court erroneously instructed the jury, the court must review the charge as a whole, in light of the evidence, to determine whether it adequately conveyed the controlling legal principles. Id. at

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[5] Plaintiff also renews his motion for judgment as a matter of law pursuant to Fed. R. Civ.P. 50(b), relying on the same arguments presented in his motion to alter or amend the judgment. Plaintiff's Brief at 14-15. Judgment as a matter of law "is an extraordinary remedy when urged by an unsuccessful plaintiff who bore the burden of proof at trial." Link v. Mercedes-Benz, 788 F.2d 918, 921 (3d Cir.1986). Because there was ample evidence introduced at trial to support the jury's verdict, judgment as a matter of law must be denied.

922.

I. The Admission of Evidence of Alcohol Consumption

Hulmes contends that this court erred in admitting evidence that he had consumed alcohol shortly before the accident which led to this lawsuit. The court first ruled on this issue on plaintiff's motion in limine seeking to exclude all such evidence. Hulmes v. Honda Motor Co., 936 F.Supp. 195 (D.N.J.1996). The court revisited this issue on plaintiff's motion for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Id. at 207-12. Despite these earlier rulings, plaintiff's counsel once again attempted to "reargue" the admissibility of this evidence when other pre-trial motions were decided immediately following jury selection. Tr. of Sept. 24, 1996 at 7-20.

Plaintiff's motion for a new trial based upon this court's denial of his motion in limine to exclude all evidence of alcohol consumption presents no new arguments. There is nothing this court can add to what it has previously written on this subject. It is sufficient to note that plaintiff argues for a per se rule against the admission of evidence of alcohol consumption by a plaintiff in a civil trial in the "absence of traditional forms of 'supplemental evidence.'" Plaintiff's Brief at 18. By "traditional forms," plaintiff presumably means eyewitness testimony that the plaintiff was visibly affected either in motor coordination, or speech by alcohol. For obvious reasons no such evidence was presented at this trial. However, the cases do not support the per se rule for which the plaintiff contends. Indeed, in Guzzi v. Clarke, 252 N.J. Super. 361 (L. Div.1991), the Law Division admitted evidence of alcohol consumption absent any evidence of "drunken behavior." Id. at 366. Plaintiff makes no effort to distinguish Guzzi. Instead, plaintiff again mischaracterizes this court's holding. This court did not proclaim that a .10

percent blood alcohol content itself rendered alcohol evidence admissible. Rather, this court ruled that a .10 percent BAC, when considered with independent evidence that alcohol had been consumed,[6] could constitute supplementary evidence of unfitness to drive, at least as competent as "traditional" eyewitness testimony of "drunken behavior." Hulmes, 936 F.Supp. at 205-06.

2. Specific Evidence of Alcohol Consumption

Plaintiff contends that, notwithstanding this court's decision to admit such evidence, the evidence of alcohol consumption which was admitted in this case was irrelevant, and therefore should have been excluded under Fed. R. Evid. 401.

Hulmes contends that the evidence of alcohol consumption was irrelevant to his design defect claim because that claim was based upon a theory that the ATV's instability caused it to flip over and eject the rider after the wheel of Hulmes's ATV impacted the wheel of his brother's ATV. Hulmes argues that it was at this moment that the alleged design defect came into play, and therefore, that nothing that occurred before the wheels of the two ATVs touched is relevant, and once the collision occurred, there was nothing that Hulmes could have done to prevent the unfortunate results of the accident.

In deciding plaintiff's motion in limine on this subject, this court opined that evidence of alcohol consumption may be relevant in a product liability action on the issues of misuse and proximate cause. Hulmes, 936 F.Supp. at 201. Plaintiff

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[6] For example, in this case there was testimony from the flight nurse on the medivac helicopter that an amber fluid smelling of alcohol was suctioned from the plaintiff's stomach shortly after the accident. Tr. of Oct. 8, 1996 at 204-07.

now seeks to focus the design defect inquiry entirely on the events that took place after the collision of the two ATVs. Plaintiff cannot now contend that Hulmes's behavior before the wheels of the two ATVs touched is irrelevant to the proximate cause inquiry, without also requiring this court to engage in a "crashworthiness" or "second collision" analysis. Plaintiff, however, never pursued a "crashworthiness" theory at trial.[7] Accordingly, the jury had to determine the cause or causes of this accident from the totality of the circumstances. The plaintiff's fitness to drive bears directly upon that determination.

Hulmes similarly takes issue with this court's conclusion that evidence of alcohol consumption was relevant to his failure to warn theory. Id. Plaintiff contends that the rationale for this court's conclusion "must be that a [blood alcohol content] between .09% and .11% could theoretically make the needed warning incoherent." Plaintiff's Brief at 21. Hulmes then argues that such evidence is irrelevant because "the needed warning should have been given to him years prior to the day of the accident." Id. This argument is disingenuous. As this court has previously explained, evidence of alcohol consumption is relevant in a failure to warn case to rebut the "heeding presumption." Hulmes, 936

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[7] Counsel for plaintiff did argue that his client's behavior prior to the touching of the tires was irrelevant, see Tr. of Sept. 24, 1996 at 14, but he never presented a "second collision" scenario either to this court or to the jury. Notably, in a "crashworthiness" case, it is the plaintiff who must demonstrate what percentage of his or her injuries are directly attributable to the "second collision" and what percentage would have occurred as a result of the "first collision," even if an alternative safer design had been used in the product in question. See Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir.1976). In other words, the burden rests upon the plaintiff in such cases to prove the extent of enhanced injuries attributable to the defective design.

F.Supp. at 201. Clearly, evidence that a plaintiff who has been warned about consuming alcohol prior to riding his ATV, and nevertheless, does so, is relevant to rebut the "heeding presumption," in that it portrays an individual who is unlikely to heed warnings. Accordingly, plaintiff's challenge to the evidence of alcohol consumption based upon relevance is without merit.

More specifically, Hulmes criticizes the admission of a Cooper Hospital Lab Report reflecting plaintiff's serum blood alcohol level at or around the time of his admission. Plaintiff contends that the lab report is inadmissible hearsay. Hulmes further contends that this court never specifically addressed his objection to the lab report on hearsay grounds, but only addressed the authentication issue. See Hulmes, 936 F.Supp. at 206-07. Plaintiff suggests that this court "misconstrued" his arguments on the in limine motion. Plaintiff's Brief at 27. If so, plaintiff had numerous opportunities to disabuse the court of its "misconstruction."

On October 15, 1996, before defendants' expert, Dr. Herbert Moskowitz, testified, the following exchange occurred between plaintiff's counsel and the court regarding the admissibility of the Cooper Hospital Lab Report.

> THE COURT: Your objection is the admissibility of the Cooper Hospital records?
> MR. LEVIN: That's correct.
> THE COURT: And reliability of the information contained therein?
> MR. LEVIN: Our objection is specifically focused on the lab report.
> THE COURT: Well whatever, it's the Cooper Hospital record and particularly the lab report which is reflected in the Cooper Hospital records.

MR. LEVIN: Yes.
THE COURT: And I have ruled on that already in that opinion.
MR. LEVIN: My concern was that the record as it was reflected in the motion in limine does not show in terms of close particularity the basis of our concerns with the accuracy of that record.
THE COURT: Well, your concern is with a specific entry on that record, is it not?
MR. LEVIN: Yes, sir.
THE COURT: Well this dealt with the admissibility of the Cooper Hospital records. And obviously, you'll have a chance to contest on cross-examination and through your own rebuttal expert the reliability of the entry. So I think if your concern is have you preserved the objection--
MR. LEVIN: That's one of my concerns.
THE COURT: You have.
MR. LEVIN: Thank you.

Tr. of Oct. 15, 1996 at 147-48. Hulmes now contends that Honda failed to establish through the testimony of a "qualified witness" that the lab report at issue was trustworthy under the business records exception to the hearsay rule. Fed. R. Evid. 803(6). Honda insists that Hulmes waived this objection by not raising it at trial. Plaintiff's counsel cryptically observed on October 15th that the record might not "show in terms of close particularity the basis of our concerns with the accuracy of that record," referring to the lab report. Nowhere in the course of this colloquy did plaintiff's counsel utter the word "hearsay" or refer to Fed. R. Evid. 803(6).

On September 24, 1996, before the jury was selected, counsel addressed the admissibility of the alcohol-related

evidence. Again, plaintiff's counsel objected to this evidence, including the Cooper Hospital lab report, about which the following exchange occurred:

> THE COURT: Let's be specific so that I and [defendants' counsel] know what you're talking about.
> MR. LEVIN: Okay.
> THE COURT: There is evidence of a blood alcohol test?
> MR. LEVIN: Yes. And, your Honor has allowed that subject to--
> THE COURT: I'll allow that.
> MR. LEVIN: Subject to cross-examination.

Tr. of Sept. 24, 1996 at 21. Once again, this court's ruling on the plaintiff's in limine motion to exclude this evidence was alluded to by plaintiff's counsel and nowhere was an objection made based on hearsay grounds, or a reference made to Fed. R. Evid 803(6).

Plaintiff's omission of any reference to the hearsay rule is especially glaring when this court pointed to Rule 803(6) in its Opinion on the motion in limine, noting that "some courts have ruled that blood tests conducted as a routine matter in a hospital are admissible under Fed. R. Evid. 803(6), which does not require the proponent to establish a 'chain of custody.'" Hulmes, 936 F.Supp. at 207 n. 9 (citations omitted). Moreover, on the motion in limine, Honda submitted a lengthy deposition of a senior technologist in the Cooper Hospital chemistry laboratory, Ms. Barbara Snyder, recounting the procedures which are followed to safeguard blood samples. Plaintiff protests, as he did in arguing the in limine motions, that the identity of the technician who drew the blood for the test is unknown, as is the identity of the technician who performed the tests or entered the results into the computer. As noted, the records of the exact time of the

blood test and of the most recent calibration of the test equipment were unavailable as a result of Cooper Hospital's document retention policy. See Hulmes, 936 F.Supp. at 206-07. Plaintiff recognizes that it is his burden to show that "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Plaintiff's Brief at 29 (citing In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 289 (3d Cir.1983)). Plaintiff must point to "[d]eficiencies in the manner in which specific records are kept." In re Japanese Electronic Products, 723 F.2d at 289. The absence of information due to the expiration of the hospital's standard document retention period simply does nothing to support an assertion of lack of trustworthiness.

Furthermore, it is clear that Ms. Snyder was a "qualified person," within the meaning of Rule 803(6), who could have testified to the regular business practices of the Cooper Hospital chemistry laboratory.[8] Plaintiff cannot now be heard to complain that she did not testify, especially in light of plaintiff's repeated opportunities to state his hearsay objection to this report, and his repeated failure to make this objection plain. For these reasons, plaintiff's motion for a new trial based upon his belated hearsay objection to the Cooper Hospital lab report must be denied.

3. Violation of Statute

Plaintiff contends that it was error for the court to instruct the jury on New Jersey's Motor Vehicle law on operating a motor vehicle with a blood alcohol concentration

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[8] A party seeking to introduce evidence under Rule 803(6) need not "be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based." Federal Rules of Evidence, Note to Paragraph (6), 1974 Enactment, Federal Civil Judicial Procedure and Rules 393 (West 1996).

of 0.10 percent or more by weight and on exceeding the legal speed limit of twenty-five (25) miles per hour.

Plaintiff's sole support for this assertion of error is Ladner v. Mercedes- Benz, 266 N.J. Super. 481, in which the Appellate Division held that it was error to instruct the jury on the statutory requirement that vehicle operators set the parking brake because it invited the jury to consider the plaintiff's negligence on the fifth prong of the risk/utility analysis.[9] See Ladner, 266 N.J. Super. at 492-93. The Appellate Division's recommendation was a limiting instruction. Id. at 493-94. In this case, the jury received just such a limiting instruction. The jury was specifically charged that it could only consider a violation of either statute "on the question whether plaintiff would have heeded an adequate warning had one been given." Tr. of Oct. 23, 1996 at 78.

If, as plaintiff goes on to suggest, it was error to give these instructions because they were only marginally relevant to the "heeding presumption," it was surely harmless error. The jury found that Honda was liable for its failure to warn the plaintiff. Implicit in that finding is the jury's conclusion that Honda failed to rebut the "heeding presumption." Accordingly, the instructions on statutory violations, even if error, cannot support a motion for a new trial.

4. The Comparative Fault Instruction

Hulmes contends that it was error to instruct the jury on comparative fault, and that he is therefore entitled to a new trial. Plaintiff correctly notes that a comparative fault charge in a products liability action is only permissible when the

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[9] This prong is generally stated as: The ability of foreseeable users to avoid danger by the exercise of care in the use of the product. See Cepeda v. Cumberland Engineering Co., 76 N.J. 152, 174 (1978).

evidence supports a finding that the plaintiff voluntarily and knowingly encountered a risk of injury from a defective product. Johansen v. Makita USA, Inc., 128 N.J. 86, 94 (1992). Hulmes contends that the court's charge on comparative fault was not tailored to the specific design defect alleged in this case, i.e., the instability of the ATV and its lack of bumpers on the rear wheels. Plaintiff essentially contends that the charge on comparative fault allowed the jury to define the "known danger" which plaintiff voluntarily encountered at too high a level of generality. There is no merit to this contention.

In keeping with New Jersey's Model Jury Charges--Civil §§ 5.34H and 5.34I, the jury was instructed that, only if it found that "Robert Hulmes was at fault by voluntarily and unreasonably proceeding to encounter a known danger and that action was a proximate cause of the accident," should it proceed to "compare the fault of each party." Tr. of Oct. 23, 1996 at 79-80. As to the alleged design defect, the instability and lack of a bumper system, the jury found, in response to special interrogatory number 1-A, that there was no design defect in the Honda ATC250R. Clearly, the jury was not asked to compare, and it must be assumed that it did not compare, the fault of Honda in defectively designing the ATV with the fault of Hulmes in voluntarily encountering a "known danger." Indeed, the jury need not even have considered the questions of design defect and nature of the "known danger" together. Had it done so, the jury must necessarily have set the fault of Honda at 0%, since it found no design defect. Accordingly, even if it was error to instruct the jury on comparative fault as it related to the issue of "design defect," the error was harmless.

"As a threshold matter, a party challenging a jury instruction on a particular matter must establish that the jury in fact reached that matter. A motion for a new trial on issues that a jury did not reach will not be granted." Farra v.

Stanley-Bostich, Inc., 838 F.Supp. 1021, 1027 (E.D.Pa.1993) (citing Markovich v. Bell Helicopter Textron, Inc., 805 F.Supp. 1231, 1241 (E.D.Pa.), aff'd, 977 F.2d 568 (3d Cir. 1992); Field v. Omaha Standard, Inc., 582 F.Supp. 323, 332 (E.D.Pa. 1983), aff'd, 732 F.2d 145 (3d Cir.1984)), aff'd, 31 F.3d 1171 (3d Cir.1994). The conclusion that the jury need not have reached the comparative fault issue on the question of design defect is inescapable. This alone is sufficient to deny plaintiff the relief he requests in this portion of his motion.

More importantly, however, this case properly raised an issue of plaintiff's comparative fault. Plaintiff seeks to define the "known danger" element as the danger presented by an allegedly unstable design and the absence of rear wheel bumpers. Plaintiff characterizes defendants' definition of the same element as mere knowledge that one can be injured in an accident, which plaintiff claims would erase the threshold requirement of a knowing assumption of risk. Neither of these end points properly defines the test of a known risk. The precise nature of the "known danger" which the plaintiff is said to voluntarily encounter must be defined by the facts of the individual case. It should not be defined so broadly that mere negligence by the plaintiff can be equated with voluntarily encountering a "known danger." Neither can the term be defined so narrowly that the jury is prevented from considering a plaintiff's comparative fault unless it can be shown that the plaintiff was aware of the precise defect which is alleged to have caused her injuries. The cases speak of a "known danger" not a "known defect." See Ladner, 266 N.J. Super. at 495 ("It is not knowledge of the defect ... that is required to be proven, but, rather, evidence that plaintiff voluntarily and unreasonably encountered a known danger.").

Lewis v. American Cyanamid Co., 294 N.J. Super. 53 (App. Div.1996), is instructive on this important distinction. In Lewis, the plaintiff was injured when an aerosol insecticide

which he was using in his kitchen caught fire. The Appellate Division discussed, in considerable detail, the New Jersey rule on comparative fault in product liability actions, before remanding the case for reconsideration, inter alia, of whether the plaintiff had actual knowledge of the particular risk of fire as opposed to a mere generalized knowledge of the risk of injury, possibly from the toxicity of the insecticide.[10]

Hulmes argued at trial that the ATV was defectively designed because it was unreasonably unstable and could easily roll over in the event of an accident, throwing the rider. The "danger" he must knowingly have encountered, therefore, is the danger of injury from a similar accident. There was evidence that Hulmes was aware of this danger, even if he was unaware of the exact center of gravity of his ATV. Plaintiff testified that he was aware of the danger presented by a collision. Tr. of Oct. 1, 1996, part B, at 55. Hulmes also testified that his brother punctured his lung after being thrown from a four-wheeled ATV. Id. at 61-63.

In Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 592 (App. Div.1994), the plaintiff testified that he was unaware that a rotating impeller blade was located in a snowthrower's discharge chute, therefore, he could not be contributorily at fault for the accident which severed some of his fingers. The Appellate Division held that the testimony created a jury question on contributory fault, because the jury could have inferred a knowledge of the relevant danger from the plaintiff's testimony. Here, Hulmes testified that he did not know and had never asked about the details of his brother's ATV accident. Tr. of Oct. 1, 1996, part B, at 62.

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[10] It must be noted that the Appellate Division criticized the trial court's jury charge, which apparently did not track the language of § 5.34H of the Model Jury Charges-Civil. Lewis, 294 N.J. Super. at 79. In Hulmes's case, the jury was charged in accordance with § 5.34H.

Hulmes's brother, Nicholas, testified that Hulmes may have been there at the time of his own ATV accident and that he and his brother may have witnessed other riders involved in ATV accidents. Tr. of Oct. 3, 1996, part A, at 49-51. These testimonial inconsistencies presented a jury question as to whether Hulmes was aware of the danger of an accident similar to the one in which he was involved, and yet voluntarily encountered that danger. Accordingly, there was ample justification for a jury charge on comparative fault in this case.

5. The "U-Haul Documents"

Plaintiff contends that this court erred in excluding certain warning labels produced by U-Haul for a fleet of Honda ATVs which it maintained for the rental market. These labels were attached to the U-Haul ATVs and were more detailed and extensive than the warning labels that appeared on Hulmes's Honda ATC250R.

At the July 1, 1996 hearing on the motions in limine, and again on October 3, 1996, the court expressed concern that U-Haul might not have been qualified to design an appropriate warning label for an ATV, and the record was devoid of any testimony from a representative of U-Haul regarding these warnings. Tr. of July 1, 1996 at 161-72; Tr. of Oct. 3, 1996, part B, at 54. This, concern, however, largely preceded plaintiff's counsel's suggestion that he sought to introduce the U-Haul warnings only for notice. Id. at 55. On this motion, Hulmes repeats his assertion that these documents constituted "vivid evidence" of notice. Plaintiff's Brief at 38. Plaintiff contends that this court "misconstrued the vividness of the evidence to prove just what it was offered for as undue prejudice to Honda." Id.

As the court understands plaintiff's argument, these documents were offered as evidence of notice that U-Haul

considered the warnings Honda provided with its vehicles inadequate in view of the purposes for which U-Haul had purchased these ATVs. This court's conclusion that plaintiff did not lay a sufficient foundation as to U-Haul's purpose and experience with these vehicles goes directly to plaintiff's notice argument. Thus, this court's concern with the "content" of the U-Haul warnings was not the result of some mistaken notion that plaintiff sought to introduce these documents for their truth.[11] Rather, that concern addressed the nature of the notice these documents purportedly gave to Honda. Plaintiff simply never established what this notice contained, other than notice that U-Haul put additional warning labels on its ATVs. This fact is, at best, of marginal relevance in a case of a purchaser of an ATV, not of the same model as those in the U-Haul fleet, who admitted to having read the owner's manual that accompanied his ATV "cover to cover." Tr. of Oct. 1, 1996, part B, at 4.

Moreover, insofar as these documents provided any notice of the insufficiencies of Honda's warnings, the U-Haul documents were cumulative of much of the plaintiff's evidence, as the court pointed out at the time. Tr. of Oct. 3, 1996 at 60. Ultimately, this court excluded these documents because they were potentially inflammatory and confusing to the jury, as well as cumulative of other evidence. Id. at 64-65. Plaintiff has not demonstrated that, in so doing, this court misapplied Fed. R. Evid. 403.

Indeed, plaintiff cannot demonstrate any prejudice from the exclusion of these documents, much less any impact on his substantial rights, because the jury found in his favor on the failure to warn theory, and it was on notice of the adequacy of the warning that plaintiff sought to introduce this

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[11] Exhibit P-594, for example, warned that the vehicle could "flip every which way."

evidence. For all these reasons, a new trial on this basis must be denied.

6. Lay Opinion Testimony

Plaintiff contends that this court erred in admitting the opinion of Officer James Mikulski under Fed. R. Evid. 701. Rule 701 allows opinions of non-experts to be heard when those opinions or inferences are "rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701.

Based upon his post-accident investigation, Officer Mikulski testified that Hulmes was traveling over the posted speed limit of twenty-five (25) miles per hour at the time of the accident. Tr. of Oct. 8, 1996 at 174. Officer Mikulski also offered his opinion that the accident resulted from "driver inattention" because he could find no "debris" or other impediments which might have caused the accident. Id. at 177-78. Plaintiff's counsel cross-examined Officer Mikulski at some length about the measurements upon which he based his conclusions regarding the speed of Hulmes's ATV, concluding:

> Q. You are not saying here today that you have any real scientific technical accurate focused determination that this is the precise spot where the event occurred; is that right?
> A. That's correct, sir.

Id. at 193.

This issue was explored during the consideration of the parties' numerous motions in limine. At that time, this court noted that lay opinions of a technical nature may only be admitted when "the witness possesses sufficient and relevant

specialized knowledge or experience to offer the opinion." Asplundh Mfg. Div. v. Benton Harbor Engineering, 57 F.3d 1190, 1202 (3d Cir.1995). Asplundh further requires the proponent of lay opinion testimony to demonstrate "some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion." Id.

In keeping with the Asplundh standard, this court determined that Officer Mikulski had been a Mantua Township police officer for approximately five years at the time of the accident, before which he had worked in the Gloucester County sheriff's department for six years. Officer Mikulski is a graduate of the Camden City Police Academy. Although "particular educational training is of course not necessary," id., Officer Mikulski testified that, since graduation from the police academy, he had completed three additional courses related to motor vehicle accident investigation. Tr. of Oct. 8, 1996 at 135. Officer Mikulski also testified that he had investigated from fifty to one hundred motor vehicle accidents prior to Hulmes's accident. Id. at 136.

Plaintiff's sole ground for attacking Officer Mikulski's testimony is that Officer Mikulski is not competent to offer an opinion on a "technical" matter such as the speed of the ATV or the cause of the accident. Plaintiff does not suggest that Officer Mikulski's opinion is based on other opinions or reports or on anything other than the facts as they appeared to him at the scene of the accident. Rather, plaintiff claims that Officer Mikulski's testimony, because it did not demonstrate his "familiarity with the influences of the vehicle's design on flipping," should have been excluded. Plaintiff urges upon this court a singularly broad reading of Asplundh.

In Asplundh, a maintenance supervisor, who "[did] not seem to have anything to do with designing or evaluating the design of machinery," testified that a piece of machinery

had failed due to metal fatigue which he attributed to faulty design. Asplundh, 57 F.3d at 1205. The correlative would exist in this case had Officer Mikulski, lacking any experience in ATV design, testified that Hulmes's accident was caused by design flaws in the Honda ATC250R. The proposition that a lay witness cannot give an opinion which must necessarily be based upon expertise which he lacks, does not lead to the conclusion that a lay witness may never testify unless he has technical expertise in all aspects of the case. To read Asplundh for this proposition would completely eliminate lay opinion testimony from any case involving a "technical" issue. This cannot have been the Third Circuit's intention.

Officer Mikulski's duty in investigating Hulmes's accident required him to form an opinion as to the cause of the accident and to note that opinion on the accident investigation form. See Ernst v. Ace Motor Sales, Inc., 550 F.Supp. 1220, 1223-24 (E.D.Pa.1982), aff'd, 720 F.2d 661 (3d Cir.1983) (police officer who arrived at the scene of an automobile accident was permitted to testify to the point of impact as a lay witness based on his experience and his perception of physical evidence at the scene). Officer Mikulski testified at trial to no more than he was required to observe in his professional capacity. Plaintiff was given ample opportunity to cross-examine Officer Mikulski and to challenge his testimony before the jury. Accordingly, plaintiff's motion for a new trial on this ground will be denied.

7. The "Ultimate Outcome" Charge

Plaintiff contends that this court erred in failing to instruct the jury on the "ultimate outcome" of its deliberations on the comparative fault of the parties, that is, that a finding of fifty-one (51) percent or greater causative fault on the part of Hulmes would bar his recovery. Although plaintiff's counsel now stresses the importance of an "ultimate outcome" charge to his case, he was slow to assert this argument at

trial.

Neither plaintiff's original requested points for charge, nor his amended requests, contained an "ultimate outcome" charge. This omission might be interpreted merely to reflect plaintiff's belief, which is vigorously pressed in this motion, that a comparative fault charge was never appropriate in this case. Notably, however, plaintiff opposed the comparative fault charge immediately after seeing a first draft of the court's instructions to the jury without mentioning the "ultimate outcome" charge. Tr. of Oct. 22, 1996 at 229- 44. The following morning, the court returned to the draft jury instructions and special interrogatories. Tr. of Oct. 23, 1996 at 2. At that time, plaintiff pressed a distinct request, based on New Jersey's Model Jury Charge § 5.34G, for a limiting instruction on proximate cause "where comparative negligence is not applicable." See Plaintiff's Requested Point for Charge No. 22, subsection 2. The court ultimately refused to give this charge based upon its conclusion that the doctrine of comparative fault was applicable to this case. Tr. of Oct. 23, 1996 at 17. Plaintiff's counsel concluded:

> THE COURT: Is there anything else you wish to place on the record, Mr. Levin? You want to consult with your counsel?
> MR. LEVIN: Yes, sir. (short pause)
> MR. LEVIN: Thank you, your Honor, nothing else on the points for charge or the jury verdicts.
> THE COURT: Pardon?
> MR. LEVIN: Nothing else on the points for charge or the jury verdict.

Tr. of Oct. 23, 1996 at 22. Following some discussion of the exhibit list, the jury was brought in and the charge read. Id. at 46-98. Not until the court asked for any "additional objections" to the charge did plaintiff's counsel first address

the omission of an "ultimate outcome" charge. Id. at 100. Even then, counsel was unable to cite any New Jersey caselaw in support of such an instruction in a product liability case. Id. at 101. Plaintiff now asserts that the omission of an "ultimate outcome" charge in this case adversely affected his substantial rights, necessitating a new trial. I disagree.

In Roman v. Mitchell, 82 N.J. 336 (1980), the Supreme Court of New Jersey held that trial courts should instruct the jury as to the legal effect of the application of the comparative negligence statute to the jury's findings. That court also observed, "[t]here is nothing in the statute which specifically requires that the jury be instructed" on the ultimate outcome. Id. at 345. The rule in New Jersey is thus a judge-made rule.[12]

The Roman court reasoned that a jury would be "better able to fulfill its fact-finding function" if informed of the legal effect of its findings. Id. at 346. The court did not elaborate on its rationale, but instead, relied primarily on Seppi v. Betty, 579 P.2d 683 (Idaho 1978), in which the Idaho Supreme Court discussed the then emerging trend toward allowing the trial judge to instruct the jury on the effect of its allocation of fault. See id. at 686-92.

Two observations about Seppi must be noted. First, the Idaho Supreme Court held that it was not reversible error to inform the jury of the ultimate outcome of the

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[12] As such, it is a response to the judge-made rule against informing the jury of the effect of its conclusions. This rule, also called the "blindfold" rule, probably was first announced by the Wisconsin Supreme court in 1890. Ryan v. Rockford Ins. Co., 46 N.W. 885 (Wis.1890). See Stuart F. Schaffer, Comment, Informing the Jury of the Legal effect of Special Verdict Answers in Comparative Negligence Actions, 1981 Duke L.J. 824, 830 (1981).

apportionment of comparative fault. Id. at 692. In contrast to Seppi, and without further discussion, the New Jersey Supreme Court fashioned an affirmative rule that the jury should be so informed, except in complex cases "involving multiple issues and numerous parties ... if it would tend to mislead or confuse the jury." Roman, at 346-47. Second, the court in Seppi based its conclusion, at least in part, on the concern that a fifty-fifty division of fault would be "singularly attractive to a jury," and that such a division would bar the plaintiff's recovery in Idaho. Seppi, 579 P.2d at 690.

In New Jersey, a plaintiff will recover as long as his or her comparative fault is "not greater than" the combined fault of the defendants. N.J. Stat. Ann. § 2A:15-5.1 (West 1987). Indeed, the Seppi court noted that "Wisconsin, though not changing its rules to permit informing the jury of the legal effect of their answers, did adopt a 'no greater than' comparative negligence statute," and that such a statute "gives the plaintiff the benefit of the attractive 50-50 apportionment of negligence." Seppi, 579 P.2d at 691. See also Roman, 82 N.J. at 355-56 (Clifford, J., dissenting) (noting that New Jersey's Comparative Negligence Act was patterned on Wisconsin's act, and arguing that it should, therefore, be interpreted in accordance with the constructions placed upon it by Wisconsin courts, absent any contrary direction from the New Jersey Legislature)

The rationale for the "blindfold rule" was succinctly stated by the Wisconsin Supreme Court.

> Under our system of jurisprudence, the jury is the finder of fact and it has no function in determining how the law should be applied to the facts found. It is not the function of a jury in a case between private parties on the determination of comparative negligence to be influenced by sympathy for

> either party, nor should it attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors.

McGowan v. Story, 234 N.W.2d 325, 329 (Wis.1975).

Where the giving or withholding of an instruction on the legal effect of the jury's comparative negligence findings is discretionary, one court approved such an instruction following "an inquiry from the jury that strongly implied confusion and speculation." Schabe v. Hampton Bays Union Free School Dist., 480 N.Y.S.2d 328, 337 (N.Y. App. Div. 1984). However, it seems equally probable that an "ultimate outcome" instruction following such an inquiry could have a pernicious effect. This was amply illustrated in Riley v. K Mart Corp., 864 F.2d 1049 (3d Cir. 1988). In Riley, an "ultimate outcome" instruction was given along with the initial charge. However, in answering a communication from the jury, the district court failed to repeat the "ultimate outcome" instruction. The jury returned a verdict assigning thirty (30) percent of the comparative fault to the defendant and seventy (70) percent to the plaintiff, and set the plaintiff's damages at $ 250,000.00. Riley, 864 F.2d at 1051. Presumably, based upon its "ultimate outcome" instruction, which was intended to inform the jury that no damages were to be awarded if the plaintiff's negligence exceeded fifty (50) percent, the district court faced what it considered an inconsistent verdict. Id. at 1052. Accordingly, the district court again explained the effect of the comparative negligence findings and the jury returned to deliberations. Id. The jury revised the special verdict to reflect 49.9% negligence on the plaintiff's part and 50.1% on K Mart's part, and damages in the amount of $ 150,000.00. Id. The district court entered judgment in favor of the plaintiff for $ 75,150.00. Id.

The Third Circuit vacated and remanded, pointedly noting that "[a]fter being reminded of Pennsylvania's rule on comparative negligence, the jury revised its still warm factual findings to reach the damage award it desired. In a matter of minutes, the plaintiff's damages dropped by $ 100,000.00 and the defendant's negligence increased by 20%." Id. at 1054. The Third Circuit further opined that, in view of the jury's original apportionment of negligence, the judgment for the plaintiff "seems to fly in the face of the Commonwealth of Pennsylvania's clearly expressed policy of denying recovery to a plaintiff whose negligence exceeds that of the defendant. To uphold the judgment entered below would be to sanction a verdict disrespectful of the applicable substantive law." Id. at 1055.

Moreover, it is not clear that the omission of an "ultimate outcome" charge in this case, even if it was error, adversely affected any substantial right of the plaintiff. New Jersey recognizes that the omission of the "ultimate outcome" charge can sometimes be harmless error.

In Vartenissian v. Food Haulers, Inc., 193 N.J. Super. 603 (App. Div. 1984), the Appellate Division of the New Jersey Superior Court found "substantial deficiencies" in the trial court's charge to the jury. Id. at 609. Among these was the omission of an "ultimate outcome" charge. Id. 610. The appellate court noted that plaintiff's counsel failed to object to the omission of the charge. Id. However, the Vartenissian court did not rest its decision on counsel's failure to object. Instead, the court held that, by resolving the case through its assignment of eighty (80) percent of the negligence to the plaintiff and only twenty (20) percent to the defendant truck driver, "the jury could not have found that [the defendant truck driver] was more negligent than the plaintiff." Id. Accordingly, the Vartenissian court ruled that the omission of the "ultimate outcome" charge was harmless error. Id.

The reasoning of Vartenissian is compelling. In Hulmes's case, the jury assigned sixty-six (66) percent of the causative fault to the plaintiff and only thirty-four (34) percent to the defendants. This result is not suggestive of a jury entranced by the "singularly attractive" alternative of a roughly fifty-fifty split. Nor was there any communication from the jury hinting that the jurors were hampered in any way in their deliberations by the absence of an "ultimate outcome" instruction. In view of the jury's assignment of roughly twice as much causal fault to Hulmes, it is difficult to believe that any substantial right of the plaintiff's has been infringed. Given the jury's allocation of sixty-six (66) percent comparative fault to Hulmes, I conclude that the omission of the "ultimate outcome" charge in this case, even if error, was harmless error.

Moreover, the New Jersey Supreme Court's holding in Roman that an "ultimate outcome" instruction should be given in a comparative negligence case was not absolute. As the court noted: "[I]n a complex case involving multiple issues and numerous parties, the trial court, in the exercise of sound discretion, could withhold the instruction if it would tend to mislead or confuse the jury." Roman, 82 N.J. at 346-47.

This product liability case required the jury to consider two sophisticated and doctrinally distinct theories of liability and to weigh considerable expert testimony on difficult issues such as dynamic stability. New Jersey's Product Liability law, which employs presumptions and multiple part tests of risk versus utility, is highly nuanced. Indeed, there is no reported New Jersey case which has considered whether an "ultimate outcome" charge should be given in a product liability case.[13]

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[13] The New Jersey Model Jury Charges suggest that an "ultimate outcome" charge may be given in a product liability case if the language of the charge is tailored to the circumstances. Model Jury Charges--Civil § 8.21(A) n. 1. The only case cited in the

Given the complexity of the task the jury was asked to undertake, in my view, to have given the "ultimate outcome" charge in this case would have misled or confused the jury.

Defendants maintain that Roman v. Mitchell is not controlling in this case in any event because this court's instruction to the jury upon submission of special interrogatories is a matter of federal procedure, rather than state substantive law. See Fed. R. Civ. P. 49(a). See also Thedorf v. Lipsey, 237 F.2d 190, 193 (7th Cir. 1956). Plaintiff, without citation to caselaw or other authority, characterizes this contention as "ludicrous." Reply Brief at 8.

Plaintiff has pointed to no published case from any Circuit Court of Appeals reversing a district court for failure to give an "ultimate outcome" instruction in even the simplest of comparative negligence cases. Nor has this court's research revealed such a case. On the other hand, there are federal appellate cases standing for the proposition that the scope and content of a district court's special verdict is controlled by Fed. R. Civ. P. 49(a) and not by state law.

In Lowery v. Clouse, 348 F.2d 252 (8th Cir. 1965), a diversity action, then- Circuit Judge Blackmun confronted the mirror image of the argument which plaintiff presses on this motion. At the time, Minnesota courts held that, when a special verdict was used, it was reversible error if the jury was "advised, expressly or by implication, of the result of its findings." Id. at 260 (citations omitted) It was argued that the district court's charge "impliedly" informed the jury of the legal effect of its answers. Id. at 259. The Eighth Circuit nevertheless affirmed, holding that the phrasing of the special verdict in a federal district court "is a matter of procedure

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Model Jury Charges, however, is not a product liability case. See Williams v. Town of Phillipsburg, 171 N.J. Super. 278 (App.Div.1979).

governed by the federal rules and not by state practice." Id. at 260. This holding was subsequently reaffirmed by a different panel of that court. See Davis v. Oberholtzer, 588 F.2d 243, 246 (8th Cir. 1978).

The conclusion that giving or withholding an "ultimate outcome" charge is procedural finds further support in those states which have accomplished uniformity on this issue through amendments to their Rules of Civil Procedure. See, e.g., Texas R. Civ. P. 277 ("The court shall also instruct the jury to answer the damage question or questions without any reduction because of the percentage of negligence or causation, if any, of the person injured."); Minn. R. Civ. P. 49.01(b) ("[T]he court shall inform the jury of the effect of its answers to the comparative fault question ..., unless the court is of the opinion that doubtful or unresolved questions of law or complex issues of law or fact are involved which may render such instruction or comment erroneous, misleading, or confusing to the jury.").

Because the omission of an "ultimate outcome" charge in this case, if it was error, was harmless error, and, as noted, even under New Jersey law, it was within the court's discretion to refuse to give such a charge, plaintiff's motion for a new trial on this basis will be denied. Accordingly, it is unnecessary to determine whether the decision to give or withhold an "ultimate outcome" charge upon the submission of special verdicts is governed by federal procedural law or state substantive law in a diversity action in this court.

8. Comparative Risk Analysis

Plaintiff argues that this court erred in admitting testimony based upon comparative risk analysis. In deciding plaintiff's motions in limine, this court ruled that, as a general matter, the comparative risk of ATV riding, snow mobiling or bungee jumping was irrelevant in a product liability case. As

was pointed out then, "[t]here is some degree of risk of an unhappy outcome associated with almost every human endeavor." Tr. of July 1, 1996 at 7. However, it was then understood that testimony concerning comparative risk analysis might be admissible to rebut certain documentary evidence relating to the Consumer Products Safety Commission's investigation into ATVs, were such evidence admitted. Id. at 8-9.

Prior to trial, plaintiff again sought to admit evidence drawn from the Consumer Products Safety Commission's ATV investigation. Some of this material was admitted, thereby opening the door to rebuttal evidence in the form of comparative risk analysis. The danger that the jury would accord undue authority to an investigation conducted by an official arm of the government required the admission of some evidence which would tend to rebut the CPSC data. It was for this purpose alone that the comparative risk analysis testimony was admitted. Plaintiff was aware that the court would allow this evidence for that purpose. At the charging conference, plaintiff failed to request a limiting instruction confining the jury's consideration of this evidence to its value in rebutting the CPSC material. In view of all these factors, plaintiff's motion for a new trial on this basis must be denied.

9. The "Super Trike" Brochure

Plaintiff maintains that this court erred in excluding from evidence an advertising brochure prepared by Honda for a small segment of Japanese consumers. Plaintiff characterizes this document as an admission by a party opponent going to the issue of design defect. It is nothing of the kind. This document contains nothing which could be termed an admission of "defect."

As to plaintiff's claims that the "Super Trike" brochure was crucial evidence on his failure to warn theory, plaintiff

presented no evidence that the brochure was ever intended as a warning of any kind. Apparently, the brochure was advertising material which was sold in Japan to a limited number of off- road motorcycle enthusiasts. Therefore, plaintiff's characterization of this brochure as a "warning" that was delivered to the Japanese consumer, but withheld from the American consumer is unsupported by the record and highlights the potential for prejudice arising from this brochure had it been admitted into evidence. See Tr. of Oct. 3, 1996, part B, at 79. Moreover, I am again constrained to observe that, as to plaintiff's failure to warn theory, the exclusion of this document could not have prejudiced the plaintiff, since the jury found in his favor.

10. The Honda Advertising "Outtakes"

Masayuki Tanaka testified as an expert on behalf of Honda concerning the testing of ATVs. As part of his testimony, Mr. Tanaka showed videos of ATVs performing under test conditions. Plaintiff contends that, in cross-examining Mr. Tanaka, he should have been allowed to play "outtakes" from a Honda promotional video which showed ATVs flipping over. The court concluded that plaintiff had laid no foundation for screening the "outtakes" in rebuttal, because there was no evidence that the test conditions about which Mr. Tanaka testified were in way similar to the conditions under which the promotional video was filmed. Tr. of Oct. 17, 1996 at 18-19. It remains entirely unclear how Mr. Tanaka could usefully have commented on these "outtakes" without some knowledge of the conditions under which the filming took place. Accordingly, plaintiff's motion for a new trial on this ground will be denied.

11. Evidence of Modifications

Plaintiff asserts that a new trial is warranted because the evidence of modifications which he made to his ATV

created the impression in the minds of the jurors that Hulmes's Honda ATC25OR was, at the time of the accident, "no longer the same product" which he purchased. Plaintiff's Brief at 49. This topic was exhaustively discussed during argument on pre-trial issues. Tr. of Sept. 25, 1996 at 204-09. Honda stipulated that it would not seek to show substantial modification or misuse of the ATV. Id. Honda offered the evidence in question solely to show that Hulmes was an experienced ATV enthusiast. There is no reason to believe that the jury used this information for any other purpose. Hulmes's experience, vel non, goes to his knowledge of the danger presented by the vehicle and the likelihood that he would have heeded additional warnings. The jury found in Hulmes's favor on the failure to warn issue. Accordingly, this evidence could not have prejudiced Hulmes's substantial rights and his motion based on this ground must be denied.

12. The Aftermath of the Accident

Plaintiff claims that this court erred in admitting testimony that Nick Hulmes, plaintiff's brother, pulled him from underneath the pickup truck where he came to rest after that accident. Plaintiff argued that the evidence allowed the jury to conclude incorrectly that some or all of plaintiff's injuries resulted from the conduct of Nicholas Hulmes. There is no merit to this argument.

Honda stipulated that the evidence of Nicholas Hulmes's post-accident conduct was not being offered to show that Nicholas Hulmes exacerbated the injuries suffered by the plaintiff. Tr. of Sept. 25, 1996 at 132. Honda offered the evidence to establish that Nicholas Hulmes had removed a beer bottle from his brother's waistband before the paramedics arrived on the scene. The court allowed this testimony as relevant to the issue of alcohol consumption. This issue has been addressed above and need not be reconsidered now. Plaintiff's motion based on the post-accident conduct of

Nicholas Hulmes will be denied.

13. Dr. Mercaldi's Testimony

David W. Mercaldi, Honda's engineering expert, offered an opinion of the speed of Hulmes's ATV at the time of the accident based upon certain tests he performed. Tr. of Oct. 21, 1996 at 50. Plaintiff contends that these tests were unreliable and that Mercaldi's evidence inadmissible under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). These tests were extensively described by Dr. Mercaldi, out of the presence of the jury. Tr. of Oct. 21, 1996 at 46-105. At this Rule 104 hearing, Honda successfully demonstrated by a preponderance of the evidence that Dr. Mercaldi's test methodologies were reliable. The burden of proving by a preponderance that expert testimony is reliable is not meant to be an onerous one. In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 743-45 (3d Cir.1994). Indeed, Honda filed an in limine motion seeking to bar the testimony of plaintiff's engineering expert, also based upon an appeal to Daubert, which was denied. Tr. of July 1, 1996 at 159. In denying Honda's motion this court adopted the view that whether the alternative designs suggested by plaintiff's expert were feasible, or whether the testing methods employed were state-of-the art, were not proper issues for a threshold determination under Daubert. See In re Paoli, 35 F.3d at 744 ("The grounds for the expert's opinion merely have to be good, they do not have to be perfect."). Rather, Daubert requires the district court to determine whether novel or untested methodologies are sufficiently reliable that conclusions based upon them can be of some use to the jury. Id.

In this spirit, the court admitted the testimony of plaintiff's expert, Dr. Huston, and the jury heard his opinions regarding what he considered to be flaws in the designs of various Honda ATVs. On cross-examination, Honda

vigorously attacked the sufficiency of the testing upon which Dr. Huston based his opinions. In its case, Honda put on Dr. Mercaldi, in part, to refute Dr. Huston's conclusions regarding Honda ATV designs. The court applied the same rationale in admitting Dr. Mercaldi's testimony that it applied in admitting Dr. Huston's testimony. There was no error in so doing.

Plaintiff also objects to the timing of the disclosure of photographs and videotapes of Dr. Mercaldi's testing procedures. When this objection was raised at the Rule 104 hearing, the court limited his testimony and video presentation to tests of which plaintiff's counsel received timely submissions in still picture or video format. Tr. of Oct. 21, 1996 at 105-13.

The tests which Dr. Mercaldi performed were intended to rebut assertions made by plaintiff's engineering expert, Dr. Jeffrey Huston, at his deposition. The still photographs of these tests were presented to plaintiff's counsel at Dr. Mercaldi's deposition on August 12, 1996, only a few weeks after the tests were completed. It is difficult to imagine how plaintiff was prejudiced by this production, even if it was not as timely as humanly possible. This is especially so in that Dr. Mercaldi was not allowed to testify about, or describe any tests which were not presented in some form to plaintiff's counsel at his deposition. Plaintiff's assertion of surprise, therefore, is unfounded.

14. Testimony of Glynn and Tanaka

Plaintiff objects to the admission of the testimony of Edward F. Glynn, Assistant to the Executive Vice-President of American Honda Motor Company, Inc., and Masayuki Tanaka, an expert for Honda who supervised product testing of ATVs. It is difficult to determine the basis for this objection. Plaintiff appears to argue that this testimony was more prejudicial than probative. However, plaintiff fails to cite

particular testimony and describe how it prejudiced his case. Instead, plaintiff paints with a broad brush, faulting the court for allowing the witnesses "to present lengthy multimedia presentations to the jury as if the trial were a shareholders' meeting." Plaintiff's Brief at 55.

To place this argument in perspective, plaintiff called Mr. Glynn during his case-in-chief to testify regarding the CPSC's ATV investigation and specifically Honda's efforts to disseminate a safety letter as part of its consent decree with the CPSC. Tr. of Oct. 7, 1996 at 33-107. Honda recalled Mr. Glynn during its case to develop further Honda's response to the CPSC investigation and its product warning procedures. Honda was under an ongoing duty, even after the ATV in question left its control, to take reasonable steps to warn the user of any newly discovered defects. The question of the reasonableness of Honda's actions in light of the CPSC investigation was for the jury to decide. Mr. Glynn's testimony addressed this issue.

Similarly, Mr. Tanaka's testimony concerning Honda ATV design and product testing was relevant to rebut testimony from plaintiff's expert regarding purported "design flaws." Mr. Tanaka was identified as an expert in ATV design who could testify to the design choices made by Honda. This was appropriate in view of the testimony of Dr. Huston, who made a broad attack on three-wheeled ATVs, preferring a four-wheeled design including a roll cage. Accordingly, there was no error in admitting this testimony.

In connection with this argument, plaintiff maintains that Tanaka should not have been permitted to "illustrate" his testimony relating to Honda's testing procedures with laser videos. Plaintiff maintains that these videos were irrelevant to any issue in the case.

15. Weight of the Evidence and Fundamental

Fairness

Finally, plaintiff argues that the jury's verdict was against the weight of the evidence and that the trial was fundamentally unfair. These arguments merely summarize the issues plaintiff has presented in these motions. As set forth above, plaintiff fails to meet the standard which would allow this court to set aside the jury's verdict. Plaintiff's argument that the trial lacked fundamental fairness is entirely unpersuasive. Accordingly, plaintiff's motion for a new trial based on the weight of the evidence and fundamental fairness will be denied.

III. Conclusion

For all the reasons set forth above, plaintiff's motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), and his alternative motion for a new trial pursuant to Fed. R. Civ. P. 59(a), will be denied. The court will enter an appropriate order.

/S/ STEPHEN M. ORLOFSKY
STEPHEN M. ORLOFSKY
United States District Judge

Dated: March 11, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	HON. STEPHEN M. ORLOFSKY CIVIL ACTION NO. 93-2771 CONSOLIDATED ACTIONS ORDER
SHERRY HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	

[Order of the District Court dated July 22, 1996]

This matter having come before the Court on July 1, 1996, on plaintiff's motion in limine to exclude all references to alcohol consumption by Robert T. Hulmes, Lewis M. Levin, Esq., and Robert Murphy, Esq., of Lewis M. Levin & Associates, appearing on behalf of the plaintiff, Robert T. Hulmes, and Robert St.L. Goggin, Esq., and Brian C. Dareff, Esq., of Marshall, Dennehy, Warner, Coleman & Goggin, and Paul G. Cereghini, Esq., of Bowman & Brooke, appearing on behalf of the defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc.; and,

The Court having considered the briefs, deposition testimony and exhibits filed in support of and in opposition to this motion, as well as the oral argument of counsel, for the reasons set forth in this Court's OPINION, filed concurrently with this ORDER;

It is on this 22nd day of July, 1996, ORDERED that plaintiffs' motion in limine to exclude all references to alcohol consumption by Robert T. Hulmes is DENIED.

/S/ STEPHEN M. ORLOFSKY
STEPHEN M. ORLOFSKY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and SHERRY HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants.	HON. STEPHEN M. ORLOFSKY CIVIL ACTION NO. 93-2771 FINAL JUDGMENT

[Final Judgment of the District Court dated October 31, 1996]

This matter having been tried before the Court and a jury from September 24, 1996 through October 31, 1996, Lewis M. Levin, Esq., and Joseph Viola, Esq., of Lewis M. Levin & Associates, appearing on behalf of the plaintiff, Robert T. Hulmes, and David S. Bross, Esq., appearing on behalf of the plaintiff, Sherry Hertlein (Sherry Hulmes), and Robert St.L. Goggin, Esq., and Brian C. Dareff, Esq., of Marshall, Dennehy, Warner, Coleman & Goggin, and pro hac vice counsel Paul G. Cereghini, Esq., of Bowman & Brooke, appearing on behalf of the defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American

Honda Motor Company, Inc.; and,

The Court having instructed the jury to answer special interrogatories and to render a special verdict, and the jury having duly answered the special interrogatories and having found the plaintiff, Robert T. Hulmes, sixty-six (66) percent at fault, in accordance with N.J. Stat. Ann. § 2A:15-5.1; it is hereby

ORDERED, on this 31st day of October, 1996, that judgment is entered in favor of defendants and against plaintiffs, and it is further

ORDERED that each side shall bear its own costs.

/S/ STEPHEN M. ORLOFSKY
STEPHEN M. ORLOFSKY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	HON. STEPHEN M. ORLOFSKY CIVIL ACTION NO. 93-2771 CONSOLIDATED ACTIONS ORDER
SHERRY HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	

[Order of the District Court dated March 11, 1997]

This matter having come before the Court on March 7, 1997, on the Motion of Plaintiff, Robert T. Hulmes, to Alter or Amend the Judgment entered in this case on October 31, 1996, and Plaintiff's alternative Motion for a New Trial, and Plaintiff, Sherry Hertlein having joined the motion, Lewis M. Levin, Esq., Joseph Viola, Esq., and Robert Murphy, Esq., of Lewis M. Levin & Associates, appearing on behalf of Plaintiff, Robert T. Hulmes, David S. Bross, Esq., appearing on behalf of Plaintiff, Sherry Hertlein, and Robert St.L. Goggin, Esq. and Brian C. Dareff, Esq., of Marshall, Dennehy, Warner, Coleman & Goggin, and Paul G. Cereghini, Esq., of Bowman & Brooke, appearing on behalf of the Defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc.; and,

The Court having considered the briefs, the trial transcripts and trial exhibits, for the reasons set forth in this Court's OPINION, filed concurrently with this ORDER,

It is on this 11th day of March, 1997, ORDERED that the Motion of Plaintiff, Robert T. Hulmes, to Alter or Amend the Judgment entered in this case on October 31, 1996, pursuant to Fed. R. Civ. P. 59(e), and Plaintiff's alternative motion for a new trial pursuant to Fed. R. Civ. P. 59(a), are DENIED.

/S/ STEPHEN M. ORLOFSKY
STEPHEN M. ORLOFSKY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ROBERT T. HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., HONDA RESEARCH AND DEVELOPMENT GROUP, LTD., HONDA R & D NORTH AMERICA, INC., and AMERICAN HONDA MOTOR COMPANY, INC., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	HON. STEPHEN M. ORLOFSKY CIVIL ACTION NO. 93-2771 CONSOLIDATED ACTIONS AMENDED ORDER
SHERRY HULMES, Plaintiff, vs. HONDA MOTOR COMPANY, LTD., et al., Defendants. and HONDA MOTOR COMPANY, LTD., et al., Third Party Plaintiffs, vs. NICHOLAS J. HULMES, Third Party Defendant.	

[Order of the District Court dated March 17, 1997]

This matter having come before the Court on March 7, 1997, on the Motion of Plaintiff, Robert T. Hulmes, to Alter or Amend the Judgment entered in this case on October 31, 1996, and Plaintiff's alternative Motion for a New Trial, and on the renewed Motion of Plaintiff, Robert T. Hulmes, for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b), and Plaintiff, Sherry Hertlein having joined these motions, Lewis M. Levin, Esq., Joseph Viola, Esq., and Robert Murphy, Esq., of Lewis M. Levin & Associates, appearing on behalf of Plaintiff, Robert T. Hulmes, David S. Bross, Esq., appearing on behalf of Plaintiff, Sherry Hertlein, and Robert St.L. Goggin, Esq. and Brian C. Dareff, Esq., of Marshall, Dennehy, Warner, Coleman & Goggin, and Paul G. Cereghini, Esq., of Bowman & Brooke, appearing on behalf of the Defendants, Honda Motor Company, Ltd., Honda Research and Development Group, Ltd., Honda R & D North America, Inc., and American Honda Motor Company, Inc.; and,

The Court having considered the briefs, the trial transcripts and trial exhibits, for the reasons set forth in this Court's OPINION, filed on March 11, 1997,

It is on this 17th day of March, 1997, ORDERED that the Motion of Plaintiff, Robert T. Hulmes, to Alter or Amend the Judgment entered in this case on October 31, 1996, pursuant to Fed.R.Civ.P. 59(e), and Plaintiff's alternative motion for a new trial pursuant to Fed.R.Civ.P. 59(a), is DENIED.

IT IS FURTHER ORDERED that the Plaintiff's renewed Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b) is DENIED.

/S/ STEPHEN M. ORLOFSKY
STEPHEN M. ORLOFSKY
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5135

ROBERT T. HULMES

v.

HONDA MOTOR COMPANY, LTD.;
HONDA RESEARCH AND DEVELOPMENT GROUP, LTD.;
HONDA R & D NORTH AMERICA, INC.;
AMERICAN HONDA MOTOR COMPANY, INC.
Defendants/Third-Party Plaintiffs

v.

NICHOLAS J. HULMES
Third Party Defendant

(Camden New Jersey District Civil No. 93-02771)

SHERRY HULMES

v.

HONDA MOTOR COMPANY, LTD.;
HONDA RESEARCH AND DEVELOPMENT GROUP, LTD.;
HONDA R & D NORTH AMERICA, INC.; AMERICAN
HONDA MOTOR COMPANY, INC.;
CORNICK, INC., t/a DEPTFORD HONDA

(Camden New Jersey District civil No. 93-03329)

ROBERT T. HULMES,
Appellant

Present: BECKER, Chief Judge,
SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA
COWEN, NYGAARD, ALITO, ROTH, MCKEE and RENDELL
Circuit Judges

SUR PETITION FOR REHEARING

The petition filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Chief Judge Becker would have granted rehearing.

BY THE COURT:

/S/ CAROL LOS MANSMANN
Circuit Judge

MAR 3 1998

LD/CC: JRV
DSB
BCD
ALF

[Honda's Brief in Opposition to Plaintiff's Motion in Limine to Preclude All References to Alcohol Consumption by Plaintiff, Robert T. Hulmes, pages 18-29]

II. Applying the Federal Rules of Evidence, Evidence of Plaintiff's Alcoholic Consumption and Intoxication is Admissible at Trial.

The Federal Rules of Evidence govern the admissibility of evidence and federal law also controls all other procedural matters in diversity cases. In ***Rovegno v. Geppert Brothers, Inc.***, 677 F.2d 327 (3d Cir 1982), Circuit Judges Aldisert & Garth, in a two to one opinion, held that they were required by the prior decision of ***Greiner v. Volkswagenwerk Aktiengeselleschaft***, 540 F.2d 85 (3d Cir. 1976), to apply Pennsylvania law in determining the admissibility of evidence of prior alcohol consumption and intoxication in a federal court sitting in diversity jurisdiction. A review of the ***Greiner*** reveals little analysis by that court in determining which law governs the admissibility of alcohol consumption and intoxication. The ***Greiner*** court, applying Pennsylvania law, permitted the introduction of evidence of plaintiff's alcohol consumption and intoxication in a products liability case against Volkswagen. Senior Circuit Judge Van Dusen dissented in the ***Rovegno*** case. In his dissenting opinion, Judge Van Dusen noted:

> All of our past decisions on this issue have either assumed or explicitly stated that the state law controls the admissibility of evidence of intoxication in a diversity case. From my reading of these case, however, the possible application of federal law - either decisional law prior to 1975 or the Federal Rules of Evidence thereafter - was never

suggested to or considered by the Court

(citation omitted). The only contrary indication is Judge Kalodner's comment in a footnote that the Pennsylvania rule applied only because "(t)here is no Federal State or **[19]** Rule of Evidence that would permit the testimony as to drinking ***Rosa V. City of Chester,*** 278 F.2d 876 (3d Cir. 1960) ***Rovegno,*** supra at 238.

In his dissenting opinion, Judge Van Dusen noted that at that time, at least two other circuits, the Fifth Circuit and Seventh Circuit, held that federal law controls this issue, citing to ***Ballou V. Henry Studios, Inc.,*** 656 F.2d 1147 (5th Cir. 1981); ***Levitt V. H.J. Jeffries, Inc.,*** 517 F.2d 523 (7th Cir. 1975).

Judge Van Dusen further noted that the Third Circuit recently held that the Federal Rules of Evidence, and not state law, "govern the admissibility of documentary evidence in Federal diversity cases." ***Pollard V. Metropolitan Life Insurance*** Company, 598 F.2d 1294 (Bd Cir. 1979) . Judge Van Dusen continued:

> I believe that these cases, as well as a close analysis of what has been called broadly the "Erie doctrine," which have substantial doubt of some assumptions concerning the law governing the admissibility of evidence in diversity which underly our previous decisions. ***Rovegno,*** supra at 338.

In a footnote, the dissenting judge noted:

> Because it is not clear to me whether we have ever actually held-rather than simply assumed-that state law controls it is equally unclear to me whether we are "bound by

Greiner or any other cases on this issue.

Indeed, in ***Straley v. United States,*** 887 Fed. Supp. 728 (D.N.J. 1995), Senior District Judge Debevoise acknowledged the argument that Federal Rules of Evidence should govern the admissibility of consumption of alcoholic beverages and [20] intoxication. Judge Debevoise pointed out that Judge Van Dusen, in his dissent in ***Rovegno,*** questioned the need for the majority in ***Rovegno*** to refer to the Federal Rules of Evidence if state law exclusively controlled the question of admissibility. Judge Debevoise went on to point out that the ***Rovegno*** decision has been the subject of academic criticism, which questioned its basis and suggested that the potential applicability of federal law to the question of admissibility may have been overlooked by counsel, citing 25 ***Weinstein & Berger, Weinstein's*** evidence, page 1101 (02)(1994); 22 ***Wright and Graham,*** Federal Practice & Procedure Sections 5201, 5224 (supp. 1994) , quoting "The Third Circuit has apparently held that a diversity case the trial court must apply state law in exercising power of discretion exclusion, questionable result if Rule 403 is properly understood." ***Wright*** Section 5224 and note 45 (supp. 1994). ***Straley,*** supra at pages 723, 735.

Judge Debevoise went to great lengths in analyzing various possible interpretations of the ***Rovegno*** holding. He noted that perhaps the ***Rovegno*** ruling should be interpreted as requiring the application of state law to determine admissibility of potentially prejudicial evidence, at least with regard to alcohol consumption.[2] With this interpretation, Judge Debevoise **[21]** indicates that the reference to Rule 403

[2]There is no suggestion in Judge Debevoise's analysis on this possible interpretation why Rule 403 would not come to bear on this issue or perhaps, more importantly, the grounds upon which the 3rd Circuit relied in carving out an exception to the applicability of the Federal Rules of Evidence in a diversity matter.

could be viewed as arising only because Pennsylvania law incorporated the same standard.

He continues that another possible interpretation was that the District Court's reliance on the Pennsylvania rule regarding admissibility was upheld under an abusive discretion standard because the Pennsylvania rule was not inconsistent with Rule 403 Judge Debevoise further points out that it is doubtful that the majority was basing its decision in ***Rovegno*** on a Rule 403 analysis, utilizing Pennsylvania law for guidance only, given that they had the benefit of Judge Van Dusen's dissent.

What can be gleaned by Judge Debevoise's opinion in the ***Straley*** matter is that he, like Judge Van Dusen, and many others, question the ***Rovegno*** decision for its failure to apply the Federal Rules of Evidence to what is clearly an evidentiary issue in a diversity jurisdiction case.

Our research reveals that at least four circuits, the First, Fifth, Seventh and Tenth, have held that Federal Rules of Evidence apply in determining whether to admit evidence of alcohol consumption and intoxication in diversity actions. Additionally, at least two other federal courts had reached the same conclusion in published opinions (one of these decisions was rendered under the Federal Tort Claims Act (FTCA))

In ***McKinnis v. AFM, Inc.,*** 765 F.2d 240 (1st Cir. 1985), a motorcycle operator sued AFM, Inc. for alleged design defects of a motorcycle sold by the defendants. Plaintiff was involved **[22]** in a collision with another vehicle which resulted in catastrophic injury to the plaintiff. In ***McKinnis,*** plaintiff argued that the federal court should utilize Rhode Island state law in determining the admissibility of evidence of consumption of alcoholic beverages and intoxication. The First Circuit rejected plaintiff's argument. Senior District Justice Pettine noted that the Federal Rules of Evidence are properly characterized as "housekeeping rules for federal courts." Congress' authority to prescribe such rules, even though they may differ from comparable to state rules, has long been recognized, citing ***Hanna V. Plumber,*** 380 U.S. 460 (1965). The Court pointed out that Congress

clearly intended the Federal Rules of Evidence would apply to diversity cases and referred to Federal Rule of Evidence 1101(b). ***McGinnis,*** supra. at pages 244, 245. The First Circuit Court Appeals noted the Third Circuit decision in ***Rovegno v. Geppert Brothers, Inc.*** and ***Greiner V. Volkswagenwerk Aktiengeselleschaft.*** The First Circuit rejected those decisions indicating that they failed to acknowledge the mandate of the United States Supreme Court in ***Hanna V. Plumber,*** Supra. Finding that the Federal Rules apply, the Court then went through an analysis as to whether plaintiff's consumption of three beers prior to the motorcycle accident was properly admitted under Federal Rule of Evidence 403. They noted that Rule 403 provided that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of accumulative evidence." The Circuit Court upheld the trial court judges' allowance of the evidence of drinking as relevant to the issue of the plaintiff's contributory negligence. ***(McGinnis,*** supra at 246.)

In ***Ballou v. Henry Studios, Inc.,*** 656 F.2d 1147 (5th Cir. 1981) , the Fifth Circuit of Appeals considered the issue of the admissibility of alcohol consumption in a diversity case arising from the deaths from an automobile driver and passenger in a collision. The District Court decision excluding blood alcohol results was reversed by the Court of Appeals applying the Federal Rules of Evidence. In ***Ballou,*** the plaintiff filed a Motion In Limine to preclude the introduction of plaintiff's decedent's blood alcohol level into evidence at trial. The Circuit Court concluded that the District Judges granting of the plaintiff's Motion in Limine was reversible error and remanded the case back to the District Court for a new trial, finding that the trial court's decision was a clear abuse of discretion under the Rule 403 balancing test.

The ***Ballou*** Court noted that under Rule 403 of the Federal Rules of Evidence, a District Court may exclude evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. `Ballou,` supra. at 1153. Weighing the probative value against unfair prejudice under Rule 403 means probative value with respect

to a material fact if the evidence is believed, not the degree the court finds **[24]** it believable, citing ***Bowden V. McKenna,*** 600 F.2d 282 (1st Cir. 1979), cert. denied, 444 U.S. 899 (1979) and 22 Wright & Graham, Federal Practice & Procedure: Evidence Section 5214, at 265-66 (1978) . In ***Ballou*** one plaintiff was the operator of a motor vehicle the other his passenger. The motor vehicle struck the rear of an 18-wheel tractor trailer which was on the right-hand shoulder of a divided highway. The driver was killed instantly, the 12 year old passenger died two days later. A blood alcohol test was performed on a blood sample taken from the body of the driver by a mortician. Plaintiff offered into evidence the testimony of a nurse who removed stitches from plaintiff approximately 10 minutes before the accident. The nurse indicated she did not recall alcohol on his breath and did not believe that he was intoxicated. The Circuit Court held that the fact finding and truth gathering function of the jury would determine whether the plaintiff's conduct was negligent in causing the collision based upon all of the facts accepted into evidence, including plaintiff's alcohol level.[3]

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[3]The Fifth Circuit properly noted that criticisms of chain of custody, which are also alleged in the instant moving papers, properly go to the weight of the evidence, rather than its admissibility and is thus reserved for the jury, citing ***United States V. Henderson,*** 588 F.2d 157 (Fifth Circuit (1979), cert. denied 440 U.S. 975 (1979); ***United States v. White,*** 569 F.2d 263 (Fifth Circuit 1978) , cert. denied 439 U.S. 848 (1978); ***United States v. Ellis,*** 547 F.2d 863 (Fifth Circuit (1977). This issue will be discussed in greater detail in Point 3 of this objection brief.

]25] The Seventh Court of Appeals decided ***Levitt v. H.J. Jeffries, Inc.,*** 517 F.2d 523 (Seventh Circuit 1975) in May, 1975, under the old Evidence Rules - Rules of Evidence for the Unites States Court and Magistrates became effective later that year. ***Levitt*** involved a case where a Chevrolet Camero automobile collided with a tractor-trailer where the Trial Court barred evidence of the consumption of intoxicating beverages applying State law, an Illinois Appellate division case. The Circuit Court reversed the lower court's decision finding an abuse of discretion. The Court held that a United States District Court sitting in a diversity case is not bound by Illinois law, but, rather, looks to Rule

43(a) F.R.Civ. P., which speaks to the admissibility of evidence in the Unites States Courts. Evidence is admissibility if it meets any one of the three prong tests stated therein. Rule 43 is a rule of admissibility not a rule of exclusion, and the statute, rule or prior practice that favors admissibility is the one that governs. citing ***Wright & Miller,*** Federal Practice & Procedure, Section 2403. ***Levitt,*** supra. 525. The ***Levitt*** Court continued holding that in a diversity case where, as here, a state exclusionary rule would exclude evidence that the Federal Court would otherwise admit under Rule 43 (a), the provisions of Rule 43 (a) must govern and the state exclusionary rule will not be followed. Citing ***Wright & A. Miller,*** Federal Practice & Procedure, Section 2403. The Circuit Court permitted the introduction of evidence of plaintiff's drinking of intoxicants notwithstanding that the defendants were **[26]** not prepared to prove intoxication and also not withstanding that the only evidence was of intoxication was a strong smell of alcohol in the Camero after the accident and the passengers acknowledgement that he and the driver had consumed a number of bottles of beer during a period of several hours prior to the accident

In ***Romine v. Parman,*** 831 F.2d 944 (Tenth Cir. 1987) the Circuit Court made the following observation:

> The admissibility of evidence in diversity cases in Federal Court is generally governed by federal law citing ***Sprynczynatyk v. General Motors Corporation,*** 771 F.2d 10112 (8th Cir. 1985); ***McGinnis v. AMF, Inc.,*** 765 F.2d 240 (1st Cir. 1985); ***In re: Air Crash Disaster near Chicago, Illinois on May 25, 1979,*** 701 F.2d 1189 (7th Cir. cert. denied 464 U.S. 866 (1983); ***Johnson V. William C. Ellis & Sons Irons Works,*** 604 F.2d 950 (5th Cir. 1979). ***Rornine,*** supra. at 944, 945.

The Tenth Circuit Court of Appeals pointed out that federal law should apply to issues of relevancy and truth seeking and noted that other circuits determined that both relevancy and prejudice should be determined as a matter of Federal Law. ***Romine,*** supra, at 945. The ***Romine*** Court held that the District Court did not abuse its discretion in deeming

that the probative value of evidence showing that the vehicle operator consumed beer on the day of the accident was not substantially outweighed by the danger of unfair prejudice. ***(Romine,*** supra at 945).

Similarly, the United States District Court for the Western District of Michigan in ***Huss v. United States,*** 738 F.2d Supp. 1098 (W.D. Mich. 1990) a federal court sitting in a Federal **[27]** Tort Claims Act matter, held that evidence of the consumption of alcoholic beverages and intoxication admissible. The ***Huss*** Court noted that although the Court is required to follow state substantive law (cite omitted) , this Court must also follow the Federal Rules of Evidence. Under the Federal Rules of Evidence, all relevant evidence is admissible unless otherwise provided by the Constitution, an act of Congress, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court. The Court further pointed out that evidence of the vehicle operator's drinking, including his blood alcohol level, is highly relevant to the issue of his comparative negligence, and its probative value is not substantially outweighed by the danger of unfair prejudice.

Similarly, in ***Hansen V. General Motors Corporation,*** 915 F.2d Supp. 118 (E.D. Missouri 1996), a Federal District Court, sitting in diversity jurisdiction, held that evidence of plaintiff's intoxication, including blood alcohol tests in hospital where he was treated, was admissible. Plaintiff fell asleep in his still running car after he parked. Thereafter, the car caught on fire and he sustained severe burns. Hansen sued General Motors Corporation alleging a product defect. A blood test was taken at the hospital where Hansen was treated The District Court noted that although the Federal Rules of Evidence generally allow for the admission for relevant evidence, Rule 403 provides that such evidence may be excluded from trial if its probative value is substantially outweighed by the danger of **[28]** unfair prejudice. District Judge Perry held that the evidence of plaintiff's intoxication at the time of the accident is both relevant and probative and that its probative value outweighs the danger of unfair prejudice to the plaintiff. ***Hansen,*** supra. at 119.

Applying the Federal Rules of Evidence to the instant case, it is clear that the evidence of plaintiff's consumption of

alcoholic beverages and plaintiff's blood level are admissible. Rules 402 and 403 generally govern the admissibility of evidence of intoxication. See ***Hansen v. General Motors Corporation,*** supra; ***Levitt v. H.J. Jeffries, Inc.,*** supra.; ***McKinnis v. AMF, Inc.,*** supra. ; ***Huss v. Unites States,*** supra.

The Federal Rules of Evidence generally allow for the admission of all relevant information. Rule 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice however Defendant's theory of this case is that the plaintiff's intoxication, not some design defect in the ATV, was the cause of the plaintiff's accident and subsequent injury. Clearly, evidence of plaintiff's consumption of alcoholic beverages and his intoxication is relevant and material to issues of plaintiff's impairment, the occurrence of the accident, comparative negligence, rebuttal of the warning heeding presumption, violation of statute and credibility. As noted by Circuit Judge Williams in the ***Ballou*** case, "unfair prejudice" as used in Rule 403 is not to be equated with testimony simply **[29]** adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be "unfair." As the notes of the Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A., Rule 403 at 201 note:

> Unfair prejudice within the context of Rule 403 "means undue tendency to suggest (a) decision on an improper basis, commonly, although not necessarily, an emotional one.

Evidence of Hulmes intoxication is unquestionably a legitimate ground for the jury's truth and fact finding role. Any slight possibility that evidence of consumption of alcohol and intoxication might adversely effect the jury's deliberation on issues is virtually insignificant when compared with the highly relevant and probative value of the evidence, to hold otherwise would be highly unfair to the defendants. Accordingly, applying the Federal Rules of Evidence, this Court should permit the introduction of evidence plaintiff's alcohol consumption and intoxication to the jury.

[Honda Brief to the Third Circuit, pages 31-34]

Accordingly, the district court did not misapply New Jersey law in admitting evidence of Hulmes's alcohol use.

B. Evidence of Hulmes's Alcohol Use Was Admissible Under The Federal Evidentiary Standard.

In the alternative, the Court should uphold the district court's admission of the alcohol evidence as a proper exercise of its discretion under Fed. R. Evid. 403.[19]

As previously discussed, a panel of this Court indicated in Rovegno that state law governs the admissibility of evidence of prior alcohol consumption and intoxication in a federal diversity case. See 677 F.2d at 329. State rather than federal law was applied because the panel considered itself bound to do so by earlier decisions. Ibid. As the dissent pointed out, however. those earlier decisions merely assumed that state law controlled without squarely considering the possible applicability of federal law. Id. at 338 (Van Dusen, J., dissenting). A closer analysis of the Erie Doctrine" casts substantial doubt on the assumptions underlying these decisions.

The broad command of Erie R.R. Co. v. Tompkins, 304 U.S. 54 (1938), is that federal courts must apply state "substantive" law and federal "procedural" law. The Erie rule has since evolved to require that if a valid federal procedural rule covers the point in dispute, the rule is to be applied regardless of contrary state law. See Hanna v. Plumer, 380 U.S. 460, 469-474 (1965). If there is no rule directly on point, the choice between state and federal law is made by reference to the "twin aims" of the Erie rule: "discouragement of

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[19] Although the district court reached its decision by applying New Jersey's evidentiary law in accordance with Rovegno, it also indicated that "[i]t would reach the same result were [it] to apply Fed. R. Evid. 403." Hulmes 1, 936 F. Supp. at 206 n.8 (B-32).

forum-shopping and avoidance of inequitable administration of the laws." Id. at 467-468.

A comparison of the Gustavson rule with Rule 403 reveals that both are "procedural" rules of evidentiary relevance. They are designed to reach almost identical results -- to provide for the **[32]** exclusion of relevant evidence where its potential for undue prejudice outweighs its probative value. Gustavson is merely a more focused relevancy rule in that it incorporates a presumption that evidence of drinking, standing alone, is not sufficiently probative of an unfitness to drive to outweigh its potential for undue prejudice. See Guzzi, 599 A.2d at 959 ("the decision in Gustavson simply represents an analysis * * * of whether the probative value of evidence of consumption of alcoholic beverages is substantially outweighed by its potential prejudice"). Rule 403 speaks directly to the exclusion of relevant evidence on grounds of prejudice and must therefore control this matter in federal cases.

Additionally, the Gustavson rule cannot reasonably be considered substantive in light of the "twin aims" of Erie. It is strictly a rule of evidence; it does not reflect a policy determination that a vehicle operator's intoxication may not be treated as fault in the comparative fault analysis, nor does it otherwise prescribe extrajudicial rights and obligations of the parties. Consequently, although the choice of the federal or state rule could conceivably affect the outcome of the litigation but see supra Part II.A, the difference between the two rules would be of scant, if any, relevance to the choice of a forum, and the failure to enforce the state rule would not unfairly discriminate against citizens of the forum state.

If this Court should conclude that New Jersey evidence law would require exclusion of the alcohol evidence, we respectfully submit that it should reconsider its ruling in Rovegno and hold that federal law -- specifically, Fed. R. Evid.403-- controls the admissibility of alcohol evidence in federal courts, even in actions in which state law supplies the rule of decision. The weight of authority supports this conclusion. See Romine v. Parman, 831 F.2d 944, 944-945 (10th Cir. 1987); McInnis v. AMF, Inc., 765 F.2d 240, 244-

246 (1st Cir. 1985)[20]; Ballou v. Henri Studios Inc., 656

[33] F.2d 1147, 1153 (5th Cir. 1981); Levitt v. H.J. Jeifries, Inc., 517 F.2d 523, 525 (7th Cir. 1975); Hansen v. General Motors Corp., 915 F. Supp. 118, 121 (E.D. Mo. 1996); Huss v. United States, 738 F. Supp. 1098, 1110 n.25 (W.D. Mich. 1990); see also 5 J. Weinstein et al., Weinstein's Evidence ¶ 1101 [021(1996) (questioning result in Rovegno and suggesting that potential applicability of federal law to question of admissibility may have been overlooked by counsel); 22 C. Wright & K. Graham, Federal Practice and Procedure §5224 (Supp. 1997).

There is no question that the evidence of Hulmes's alcohol use was properly admitted under Rule 403. Honda's theory of the case was that Hulmes's unfitness to drive, not some defect in the ATV, caused Hulmes's accident and subsequent injury. Evidence of Hulmes's alcohol use was highly relevant to this and other issues in the case. See infra Part II.C.

Moreover, the probative value of this evidence substantially outweighed any slight potential for unfair prejudice to Hulmes from its admission. The advisory committee has defined unfair prejudice under Rule 403 as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee notes; see also Ballou, 656 F.2d at 1155 ("'[U]nfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party"). Here, admission of the evidence, although potentially harmful to Hulmes's case, was not unfairly so' as it did not suggest decision on any improper basis.

For these reasons, admission of the evidence of

[20] In McInnis, a panel that included then-Judge Breyer specifically criticized Rovegno for failing to acknowledge the mandate of the Supreme Court in Hanna v. Plumer. See 765 F.2d at 245 n.6.

Hulmes's alcohol use could not constitute an abuse of the district court's discretion. To the contrary, not allowing such highly relevant and probative evidence to be presented would have been manifestly unfair to Honda. See Ballou, 656 F.2d at 1155 (holding, in negligent wrongful death action arising from motor vehicle collision, that **[34]** district court abused its discretion in excluding evidence of plaintiff's intoxication); Hansen, 915 F. Supp. at 121-122 (concluding, in automobile products liability action, that exclusion of evidence of plaintiff's alcohol use would be unfair to defendant).

C. Evidence of Hulmes's Alcohol Use Was Highly Relevant To Several Issues In The Case And Was Not Needlessly Cumulative.

1. Hulmes also argues (Br. 33-37) that the evidence of his alcohol use should have been excluded as irrelevant. Hulmes did not even think to make this argument until the eve of trial, after the parties had fully briefed the issue of the admissibility of alcohol evidence and after the district court had written two opinions on the subject. See App. 346. Hulmes's extraordinarily narrow (but convenient for him) concept of relevance is wholly untenable.

Three examples suffice to demonstrate the relevance of the challenged evidence. First, evidence of Hulmes's use of alcohol was relevant to the issue of proximate cause, since it tended to show that Hulmes's conduct was the cause-in-fact of the accident. Hulmes I, 936 F. Supp. at 201 ('3-28). Second, the evidence was relevant to rebut the heeding presumption, since it tended to show that Hulmes would not have heeded additional warnings even if they had been provided. Ibid. Third, the evidence was relevant to Honda's comparative fault defense, since it tended to show that Hulmes ~~unreasonably" proceeded to encounter a known danger. See infra Part III.

Hulmes's seeks to exclude all these uses of the alcohol use evidence on the false premise that this was, in effect, a "crashworthiness" case -- that is, like Crispin, supra, a case in which the fact of the accident is assumed and the only question is whether plaintiff suffered greater injuries than could reasonably be expected because of a product defect. Thus, Hulmes asserts that "[i]t was not an element of any

claim or any defense to prove why plaintiff's tire initially touched the tire of the other ATV" (Br. 34) and that "[t]here was nothing for the jury to decide regarding responsibility for

[Trial Transcript, October 1, 1996, page 42]

decree. I'd like to show you exhibit 524 with Honda at the top and I want to ask you, if you had received a notice in January of '88, that stated that the Consumer Products Safety Commission had concluded that ATVs may present a risk of death or serious injury and that over 900 people had died in them since '82 and that many people could become seriously paralyzed or suffer severe internal injuries and that thousands of people have been in emergency rooms while riding these ATVs and that the Consumer Products Safety Commission considered them hazardous and that it's not a toy and may be dangerous to operate and that it can roll over on the rider or violently throw the rider without warning or even hitting a small rock or bump at low speeds can upset it, what would you have done?

MR. GOGGIN: Objection, your Honor. Speculative, irrelevant. We discussed this before.

MR. LEVIN: This is on the same matter with a different exhibit.

THE COURT: I'll allow it. Objection overruled.

MR. LEVIN: You can answer it.

THE WITNESS: I would have got rid of it.

MR. LEVIN: Thank you. Cross-examination. Mr. Goggin.

MR. GOGGIN: May I see your Honor at sidebar for a moment, sir.

[Trial Transcript, October 23, 1998, pages 77-80]

within the realm of foreseeability that some harm could result from the design defect or failure to warn. If the design defect or failure to warn did not add to the risk of the occurrence of the accident and hence was not a contributing factor in the happening of the accident, then plaintiff has failed to establish that a defect was a proximate cause of the accident.

Heeding of an adequate warning. In any case in which it is alleged that the injury was attributable in whole or in part to the absence of a warning, there exists a rebuttable presumption that the plaintiff would have followed or heeded the warning had it been provided. The plaintiff is entitled to rely on this presumption in order to prove that the absence of a warning proximately caused the harm. You may also consider the plaintiff's own testimony in this regard.

The defendants may rebut or overcome the presumption that the plaintiff would have heeded an adequate warning, an adequate warning. If you find by a preponderance of the evidence that the plaintiff would not have read, understood or conformed his conduct to an adequate warning if one had been given, then Honda cannot be held liable. The defendants have the burden of showing that the plaintiff would not have heeded an adequate warning. If the defendants fail to produce sufficient evidence to rebut the so-called heeding presumption, then you must find that the plaintiff would have **[78]** followed an adequate warning. If plaintiff would have followed an adequate warning, plaintiff

has demonstrated that the inadequate warning was a proximate cause of his injuries.

You have heard evidence relating to the plaintiff's blood alcohol concentration at the time of the accident. If you find that plaintiff's blood alcohol concentration at the time of the accident was .10 percent or more by weight of alcohol in his blood, you should be aware that anyone who operates a motor vehicle with a blood alcohol concentration of .10 percent, one zero percent, or more by weight of alcohol in his or her blood violates New Jersey's Motor Vehicle Law. I charge you that such a violation of New Jersey Motor Vehicle Law may be considered by you only on the question whether plaintiff would have heeded an adequate warning had one been given.

Similarly, you have heard evidence that plaintiff may have been exceeding the legal speed limit of 25 miles per hour on West Hunterton Avenue at the time of the accident. If you find that plaintiff was exceeding the legal speed limit at the time of the accident, a violation of New Jersey's Motor Vehicle Law, I charge you that you may only consider this violation on the question whether plaintiff would have heeded an adequate warning had one been given.

Plaintiff's comparative fault. You have heard evidence **[79]** about how Robert Hulmes was using his 1984 Honda ATC 250R. During your deliberations on the first element of plaintiff's claim, namely whether the all-terrain vehicle was defective, you are not permitted to consider the plaintiff's conduct. If you find the 1984 Honda was defective, that's the 1984Honda ATC 250R was defective, then you

must decide whether plaintiff has proved the remaining elements of his claim. Only in considering the final element of plaintiff's claim, that is whether the defect was a proximate cause of the accident, may you consider the plaintiff's conduct.

Defendants contend that the plaintiff was at fault for the happening of the accident. To prevail on this defense, the defendants must prove that the plaintiff voluntarily and unreasonably proceeded to encounter a known danger and that such action was a proximate cause of the accident.

Mere failure to discover a defect in the product or to guard against the possibility of its existence is not a defense. In other words, defendants must prove that Robert Hulmes had actual knowledge of the particular danger and knowingly and voluntarily encountered that risk.

In sum, if you find that Robert Hulmes has established all the elements of his case and you also find that Honda has proven that Robert Hulmes was at fault by voluntarily and unreasonably proceeding to encounter a known danger and that action was a proximate cause of the accident, you will then **[80]**compare the fault of each party. **[Trial Transcript, October 24, 1996, pages 98-103]**

CLOSING ARGUMENT BY MR. GOGGIN

forward and tell you why they don't work. And I can tell you and the evidence was the CPSC looked into ROPS, they looked into those so-called nerf bars and they never required them on any vehicle. Four-wheelers don't have them, three-wheelers don't have them, because the disadvantages outweigh the advantages and Huston never bothered to look

or test for that.

I'm almost at the end. Actually, I'm almost out of my voice.

Alcohol. Honda did not put alcohol into this case. This document which has been much maligned is a hospital record. It's a hospital record that is relied upon every day, every week in every hospital in the country. It's a hospital record that when received by the people in the trauma room and they receive this information of ethanol alcohol, act in response to it with respect to the treatment they're going to give that person and what kind of drugs they're going to give him. That's what they get. They don't go back and say well, you could have made a mistake here, could have made a mistake, you could have made -- this is what they get, this is all they rely upon, this is their bible. 106.9, which according to Doctor Moskowitz, converts to 6 bottles of beer in the blood at the time the accident happened. Could it have been five? Could it have been nine? It's in the blood. Even Doctor Manion said booze **[99]** onboard. There is no issue. It's just a question, I suppose, of how much.

Well, we have other evidence of intoxication. First of all, we know that an unopened bottle of beer was on Mr. Hulmes in his waistband at the time this accident happened. That's relatively unusual. I think from your own common experience you know people sometimes run around with it in cars, but you wouldn't expect it to be that close to you in this situation.

Nurse McNulty, who I don't think anybody

questioned her, she was that helicopter nurse who gave such I think dynamic testimony of her role and how she did it and no ifs ands or buts. She said she in that helicopter suctioned out 300 CCs of amber fluid that smelled like alcohol. And when Mr. Levin was kind enough to put that into a tumbler, one of those Pyrex things you use in cooking, there was a fair amount of alcohol suctioned out of his mouth in the helicopter after fluid had been suctioned by the ER guys on the scene. Now, that hadn't even made it into the bloodstream yet. So that there is other evidence of alcohol. Not Honda's evidence.

Debbie and Matt Connelly told us that Nick said they were going to go to the ball field to drink beer. So that's another thing Nick didn't remember, by the way, but that's what -- so that booze was in the picture, which we did not **[100]** create. This is part of the facts of the case that you are presented with.

And one might consider whether Nick made any efforts to try and hide this booze. Why was he in such a hurry to get his brother out from underneath, put it in there and get rid of it? I think it was a concern to him. The long and short of it is, ladies and gentlemen, not only is that record reliable, but it's buttressed by these other facts and circumstances that lead you to clearly conclude that there is alcohol.

In addition to that, let's take the facts of the accident. If you believe the plaintiff, he has never been involved in a collision, never been involved in a problem, he's on a straight, level road and he runs into the guy in

front of him for the first time after nine years of riding on a street that he could clearly see in front of him. How did that happen? Does the word "impairment" come to mind? Well, of course it does. And Doctor Moskowitz and Doctor DiGregorio say impairment, absolutely. When you have that much alcohol onboard, your judgment is impaired with risk taking, perception, decision-making, reaction, vision and motor controls. We all know if you drink you swear you can handle more than that and it won't bother you. The experts tell you not only can it bother you, it could bother somebody else because you really don't know how you're effected. But **[101]** there is no refuting that. And that's the condition this man was riding in when this accident happened. Doctor Moskowitz said 800 to 1200 times more likelihood of an accident with this much alcohol onboard. Doctor Manion even agreed with that, that if this number is accurate and these things occurred, no question that he was impaired. But Doctor Manion didn't know anything about these prior events. He wasn't told anything about them, just like Doctor Huston wasn't told anything about alcohol. These events were kept from their sphere of knowledge. I don't know why, but they were.

And then if you start questioning reliability and credibility and whether somebody is a paid witness, I don't bring it out because Mr. Levin is an honorable guy, but he worked for Mr. Levin, he was an attorney in his office working for him reviewing comp cases and medical malpractice cases and he's a witness. Does he have any affiliation, a little tighter to them than one might expect? Yes.

Should you discount his testimony? I don't know, but you sure should consider it. I didn't make up that fact, that just popped out.

There are a couple of other issues and I'll end quickly, on alcohol. Doctor McCarthy from the data that he selected had a couple of charts on the risk of fatal injury with alcohol onboard. And at these levels, .001, .051, **[102]** .081,.121, you can see how the risk of injury goes geometrically up. The percent of ATV drivers involved in fatal accidents and reported to have consumed alcohol by group. And these were fatals because you could measure the alcohol in their body, you can't always when there's an injury. Look at the age group with the highest number of fatalities. Now, nothing wrong with these people, but does that show you something? Is it the product that made me do it? What does the evidence show?

A couple of I think sidelight issues that I think were thrown in, I don't know why they were thrown in. There was some question about a throttle problem that Mr. Hulmes had with his vehicle that was thrown in out of nowhere. Nobody ever heard any evidence of that. There is no suggestion that a throttle was involved.

There is that suggestion that somehow Honda doesn't keep its documents and therefore the vehicle is defective. You will get in your jury room these pages of their confirmation test reports on the ATV. If you can make a lot of sense out of them, you're better persons than I am. But he's testified at great length as to the making and keeping of the A0 documents. The only documents they don't keep

are the planning documents. He testified at great length that he used riders to evaluate their vehicles. And what better test can there be of the vehicles than a rider telling you, a **[103]** rider who knows the vehicle, riders familiar with the vehicle, the characteristics? Turns tight to the left, turns tight to the right, doesn't turn that way right, change to the other. To get feedback from those riders, I suggest to you that makes a lot of sense.

There is some issue that in the television ads there is nothing about them going through mud bogs. Well, is there any suggestion that these vehicles were clearly designed to go through all-terrain? That's why they are called all-terrain vehicles. And certainly these gentlemen rode them in all terrains, that the vehicles were designed for that. There is no issue about that whatsoever.

Group riding? Everybody knows everybody goes out with friends, but the issue is do these friends for no reason or other just run into each other? Here we have somebody who for the first time says he ran into something in front of him and the only conceivable reason, ladies and gentlemen, I suggest was alcohol.

We don't have much issue with the damage portion of the plaintiff's case. There is no doubt in our mind that this person is seriously injured. This is a catastrophe, there is no issue about that. I will tell you that there are some issues that I think if you ever got to that part of the case that you have to consider. There is a lot of things you can do with numbers. You will recall some brief . . . .

ROBERT HULMES
vs.
HONDA

and

SHERRY HERTLEIN
vs.
HONDA

CIVIL ACTION NO. 93-2771

SPECIAL VERDICT SHEET

(In response to any question you answer, please make an "x" in the appropriate box.)

Question 1. (Answer both parts a and b, and sub.-part a.i, if applicable)

a) Has plaintiff proven that the Honda ATC250R was defectively designed?

Yes _____ No ____X____

(i) If your answer to question 1.a is "yes," has Honda proven that, when this all-terrain vehicle left its control. there was not a practical and technically feasible alternative design for the all-terrain vehicle that would have prevented the harm without substantially impairing the intended or reasonably foreseeable function of the all-terrain vehicle? Yes _____ No _____

b) Has plaintiff proven that the Honda ATC250R was defective because it did not have adequate warnings or instructions?

Yes ____X____ No _____

If your answer to both questions 1.a **and** question 1.b is "No," stop, you have reached a verdict. If your answer to question 1.a is "Yes," and your answer to question 1.a.i is also "Yes," and your answer to question 1.b is "No," stop, you have reached a verdict.

Question 2. If your answer to either question 1.a or question 1.b was "Yes," and your answer to question 1.a.i, if applicable, was "No," has plaintiff proven that the defect existed before the product left the control of the defendants?

Yes ____X____ No _____

If your answer to question 2 is "No," stop, you have reached a verdict.

Question 3. If your answer to question 2 was "Yes," has plaintiff proven that at the time of the accident, the ATV was being used in a manner that was objectively foreseeable?

Yes ____X____ No _____

If your answer to question 3 is "No," stop, you have reached a verdict.

Question 4. If your answer to Question Number 3 was "Yes," has plaintiff proven that the design defect or the failure to give an adequate warning was a proximate cause of his injuries?

Yes ____X____ No _____

If your answer to question 4 is "No," stop, you have reached a verdict.

Question 5.

a) Has Honda proven that Robert Hulmes was at vault by voluntarily and unreasonably proceeding to encounter a known danger and that action was a proximate cause of the accident?

Yes ____X____ No _____

b) If your answer to Question 5.a is "Yes," taking the combined fault of the defendants and plaintiff, Robert Hulmes, as a total of 100%, what percentage of that total fault was attributable to:

Honda	34 %
Robert Hulmes	66 %

Question 6. If your answer to question No. 4 is "Yes," answer parts a, b, c, d, e and f:

a. What amount of damages, if any, is plaintiff, Robert Hulmes. entitled to recover in compensation for past medical expenses?

$ 408,000.00

(Enter a dollar amount)

b. What amount of damages, if any, is plaintiff, Robert Hulmes. entitled to recover in compensation for future medical expenses?

$ 3,060,000.00

(Enter a dollar amount)

c. What amount of damages, if any, is plaintiff, Robert Hulmes, entitled to recover in compensation for past loss of earnings?

$ 34,000.00

(Enter a dollar amount)

d. What amount, if any, is plaintiff, Robert Hulmes, entitled to recover in compensation for future loss of earnings?

$ 302,940.00

(Enter a dollar amount)

e. What amount, if any, is plaintiff, Robert Hulmes, entitled to recover for his loss of enjoyment of life?

$ 347,530.00

(Enter a dollar amount)

f. What amount, if any, is plaintiff, Robert Hulmes, entitled to recover in compensation for pain and suffering?

$ 347,530.00

(Enter a dollar amount)

Question 7. If your answer to question No. 4 is "Yes," do you find that plaintiff, Sherry Hertlein, has proven her claim for loss of consortium?

Yes __X__ No _____

If your answer to question 7 is "No," stop, you have reached a verdict.

Question 8. If your answer to question No. 7 is "Yes," what amount of damages, if any, is plaintiff, Sherry Hertlein, entitled to recover for her loss of consortium?

$ 7,500.00
(Enter a dollar amount)

/S/ Sharon Kroon
JURY FOREPERSON

October 31, 1996
DATE

BEST AVAILABLE COPY

HONDA

AMERICAN HONDA MOTOR CO., INC.
P.O. BOX 50 – 100 W. ALONDRA BLVD., GARDENA, CALIF. 90247
CABLE ADDRESS – AMEHON, GARDENA, CALIF. (213) 327 – 8280

January, 1988

ATV SAFETY ALERT

The Consumer Product Safety Commission has concluded that ALL-TERRAIN VEHICLES (ATVs) may present a risk of DEATH or SEVERE INJURY in certain circumstances. While accidents may occur for many reasons:

- Over 900 people, including many children, have died in accidents associated with ATVs since 1982.
- Many people have become severely paralyzed or suffered severe internal injuries as a result of accidents associated with ATVs.
- Thousands of people have been treated in hospital emergency rooms every month for injuries received while riding an ATV.

Because of this, the United States Government has filed a lawsuit against all manufacturers and distributors of ATVs asking the Court to declare that ATVs are hazardous and to order the manufacturers and distributors to take actions to protect ATV riders. The distributors, while contesting the validity of the allegations made by the government, are presently engaged in discussions with the government to resolve these issues without litigation.

You should be aware that an ATV IS NOT A TOY AND MAY BE DANGEROUS TO OPERATE. An ATV handles differently from other vehicles, including motorcycles and cars. According to the Consumer Product Safety Commission, an ATV can roll over on the rider or violently throw the rider without warning and even hitting a small rock, bump, or hole at low speed can upset the ATV.

TO AVOID DEATH OR SEVERE PERSONAL INJURY:

- NEVER DRIVE AN ATV WITHOUT PROPER INSTRUCTION. TAKE A TRAINING COURSE. BEGINNING DRIVERS SHOULD RECEIVE TRAINING FROM A CERTIFIED INSTRUCTOR. Call 1-800-447-4700 to find out about training courses nearest you.
- NEVER LEND YOUR ATV TO ANYONE WHO HAS NOT TAKEN A TRAINING COURSE OR HAS NOT BEEN DRIVING AN ATV FOR AT LEAST A YEAR.
- ALWAYS FOLLOW THESE AGE RECOMMENDATIONS:
  - A CHILD UNDER 12 YEARS OLD SHOULD NEVER DRIVE AN ATV WITH ENGINE SIZE 70 CCD OR GREATER.
  - A CHILD UNDER 16 YEARS OLD SHOULD NEVER DRIVE AN ATV WITH ENGINE SIZE GREATER THAN 90 CCD.
- NEVER ALLOW A CHILD UNDER 16 YEARS OLD TO DRIVE AN ATV WITHOUT ADULT SUPERVISION. CHILDREN NEED TO BE OBSERVED CAREFULLY BECAUSE NOT ALL CHILDREN HAVE THE STRENGTH, SIZE, SKILLS OR JUDGMENT NEEDED TO DRIVE AN ATV SAFELY.
- NEVER DRIVE AN ATV AFTER CONSUMING ALCOHOL OR DRUGS.

(over)

MTB 6124 88011